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39228

CHICAGO LANDSCAPE COMPANY, a
corporation,

(Plaintiff) Appellee,

v.

VILLAGE OF OAK LAWN, a Municipal
corporation, et al.,

(Defendants) Appellants.

APPEAL FROM

CIRCUIT COURT

292 I.A. 631

COOK COUNTY.

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE
COURT.

The plaintiff filed its complaint in chancery against the Village of Oak Lawn, its clerk and treasurer, praying for an accounting, a decree for the payment of certain bonds owned by the plaintiff, an injunction restraining the defendants from paying out any moneys in its general fund, or in its bond and interest fund, and for the appointment of a receiver to take possession of all moneys on hand or to be collected from the general taxes levied for the purpose of paying Waterworks Bonds.

The defendants answered the bill. The matter was referred to a master, who filed a report, to which objections and exceptions were filed and overruled. Thereupon a decree was entered by the court ordering that the plaintiff have and recover from the defendant village the sum of \$4,360.81, together with interest on the sum of \$3,325.00 at 5% per annum, and further that the defendant village be ordered and directed to pay said judgment together with interest thereon within thirty days from the date of the decree and that the President of the Board of Trustees of the defendant village direct the Village Clerk to issue a voucher for said sum payable to the plaintiff and that the Village Treasurer pay said voucher within thirty days from the date of the decree; that the fees of the master in chancery amounting to \$182.25 be taxed as costs against the defendant village and said defendant pay said master's fees to the

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RECEIVED DIRECTOR GENERAL
WASHINGTON

(RECEIVED) 10/1/1917

LETTER TO THE DIRECTOR
WASHINGTON, DC 20540

(RECEIVED) 10/1/1917

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The Director filed the complaint in January against the
 Village of New York, the city and government, having the
 responsibility, a matter for the payment of certain bonds by the
 city, as indicated in the complaint. The complaint was filed and
 was made in the general time, or in the time of the
 and for the payment of a certain bond, having the
 money on hand or to be collected from the bonds, thus having the
 the purpose of paying the bonds.

The Director returned the bill. The matter was referred
 to a board, and filed a report, to which the Director was
 was filed and returned. The board was referred to the
 board, which was filed and returned. The board was referred to the
 village the sum of \$1,000.00, together with interest on the sum of
 \$1,000.00 at the rate of 6% per annum, and interest on the balance
 be ordered and directed to pay this judgment together with interest
 thereon within thirty days from the date of the order and that the
 President of the Board of Trustees of the Village of New York
 the Village Board to issue a warrant for the sum of \$1,000.00
 against the Village of New York, and that the Village Board
 thirty days from the date of the order; and that the order
 in money amounting to \$1,000.00 be paid to the Village of New York
 the Village of New York and that interest on this money be paid to the

said master in chancery within thirty days from the date of the decree, and further, that the court retain jurisdiction to enforce the terms of the decree.

The theory upon which the case was tried and upon which the plaintiff relies is that the defendant village has collected sufficient moneys from taxes or otherwise to pay the plaintiff's bonds, and that regardless of whether the money so collected is properly applicable to the plaintiff's bonds, the plaintiff is entitled to a judgment for principal and interest due on its bonds; also to an order directing the defendant village to pay the judgment within thirty days, and that the court properly enter an order directing the defendant to pay the fees of the master in chancery, taxed as costs, within thirty days from the date of the judgment.

To this theory the defendants reply that while the plaintiff is entitled to a judgment against the defendant village for the principal and interest due on its bonds, it is not entitled to a mandatory direction on the defendants that such judgment be paid within thirty days; nor is plaintiff entitled to an order directing that the master's fees which have been taxed as costs, be paid to the master within thirty days from the time the decree was entered.

From the facts in evidence it appears that the Village of Oak Lawn enacted an ordinance on February 14, 1922, providing for the issuance of waterworks bonds in the amount of \$50,000 for the purpose of constructing a waterworks system. The ordinance provided for the levy and collection of a direct annual tax upon all of the taxable property of the village for the purpose of providing the funds required to pay the interest on the bonds when the same fell due, and to discharge the principal of the bonds at maturity. The ordinance was submitted to the voters of the village at a special election and was duly approved by a majority of the voters at said election, and thereafter the bonds were duly issued and sold.

There were fifty bonds each in the denomination of \$1,000, dated March 15, 1928, and bearing interest at the rate of five per cent per annum, payable semi-annually on September 15 and March 15 of each year. They became due in numerical order as follows:

- \$2,000 on March 15 in each of the years 1929 to 1933, inclusive;
- \$3,000 on March 15 in each of the years 1934 to 1938, inclusive;
- \$4,000 on March 15 in each of the years 1939 to 1943, inclusive;
- \$5,000 on March 15, 1944.

The direct annual tax provided in said ordinance for the payment of the bonds and interest coupons as they became due, together with the amount of bonds and interest becoming due for the corresponding period, is stated in the table specifying the due dates of the bonds and the interest thereon.

The ordinance further provided that interest and principal coming due at any time when there were insufficient funds on hand to pay the same should be paid promptly when due from current funds on hand in advancement of the collection of taxes, and when the taxes shall be collected, reimbursement shall be made to the said funds in the amounts thus advanced.

Bonds No. 1 and No. 2 matured March 15, 1929, bonds No. 3 and No. 4 matured March 15, 1930, bonds No. 5 and No. 6 matured March 15, 1931, and bonds No. 7 and No. 8 matured March 15, 1932.

Plaintiff is the owner and holder of bonds No. 3, No. 4, No. 5 and No. 6. These bonds are unpaid with the exception of bond No. 5, upon which the sum of \$325.00 remains unpaid.

The Village of Oak Lawn received taxes for the years 1928 to 1931, inclusive, amounting to \$19,123.79, and during this period the Village of Oak Lawn paid on account of interest coupons due on the total bond issue the sum of \$9,400, and the further sum of \$4,675. to apply on the maturity of certain bonds as follows:

There were fifty bonds in the possession of J. H. ...
... and opening interest at the rate of five per cent
... bonds, ... bonds in of
... bonds ... bonds in of
... bonds in of the year 1900 to 1901,
... bonds in of the year 1901 to 1902,
... bonds in of the year 1902 to 1903,
... bonds in of the year 1903 to 1904,
... bonds in of the year 1904 to 1905.

The first annual ... bonds in of the year 1900 to 1901,
... bonds in of the year 1901 to 1902,
... bonds in of the year 1902 to 1903,
... bonds in of the year 1903 to 1904,
... bonds in of the year 1904 to 1905.

The ... bonds in of the year 1900 to 1901,
... bonds in of the year 1901 to 1902,
... bonds in of the year 1902 to 1903,
... bonds in of the year 1903 to 1904,
... bonds in of the year 1904 to 1905.

... bonds in of the year 1900 to 1901,
... bonds in of the year 1901 to 1902,
... bonds in of the year 1902 to 1903,
... bonds in of the year 1903 to 1904,
... bonds in of the year 1904 to 1905.

The ... bonds in of the year 1900 to 1901,
... bonds in of the year 1901 to 1902,
... bonds in of the year 1902 to 1903,
... bonds in of the year 1903 to 1904,
... bonds in of the year 1904 to 1905.

No. 1 and No. 3	\$2,000
No. 5 and No. 6	675
No. 7 and No. 8	2,000

It further appears from the figures as called to our attention that the total amount due the plaintiff for principal and interest found in the decree, is \$4,360.81, of which \$2,608.34 is for bonds maturing on March 15, 1930, and \$1,752.47 is for bonds maturing March 15, 1931, including interest.

After completion of the waterworks system the defendant Village had on hand the sum of \$5,352.23, which consisted of interest received on bank deposits and the difference between the cost of the waterworks system and the receipts from the sale of the bonds.

From the stipulation of facts it further appears that on October 1, 1934, thirty days prior to the filing of the complaint herein, there was cash in the treasury of the Village of Oak Lawn in the sum of \$9,179.44.

The defendants contend that the trial court having entered a money judgment against the defendant Village for the amount due the plaintiff, the court could not direct that said judgment be paid within thirty days.

The defendants admit that the court properly allowed the amount found due the plaintiff for the balance due on the matured bonds of the plaintiff, together with accruing interest up to the date of the entry of the decree by the court, but contend that the court erred in directing by its decree that the amount be paid by the Village of Oak Lawn to the plaintiff within thirty days after the entry of the decree, and also in directing that certain officers issue a voucher and pay the amount found due the plaintiff by the court.

To this contention of the defendants the plaintiff answers that the pending proceeding is one in equity, and that the court having assumed jurisdiction for one purpose, assumed jurisdiction

[illegible][illegible]

in the sum of 10,175.44.

Herewith, there are sent in the Treasury of the Village of Oak Grove

October 1, 1930, thirty two dollars for the filling of the complaint

When the satisfaction of bonds is limited against each one

the waterworks system and the proceeds from the sale of the bonds.

received on bank deposits and the difference between the bond and

Village had on hand the sum of 10,175.44, which consisted of interest

after completion of the waterworks system the difference

The following names are listed as having been
a member of the National Student Reliance Fund and have
the ability to pay their own share of the cost of their
education.

The defendant admits that the amount actually received from the defendant was the liability for the balance due on the account of the defendant, defendant with standing interest on the date of the entry of the account by the court, and defendant that the amount was in discharge of the debt, and defendant that the liability of defendant to the plaintiff is hereby satisfied and discharged.

That the selling proposition is not in itself, and that the same

for all purposes, in order to administer complete justice.

This is the general rule followed by courts of equity, and it would seem that to enter a decree for the amount admitted due the plaintiff, without any further relief, would deprive the plaintiff of any means necessary to collect the amount from the defendant village, and in order to collect the moneys due it would be necessary for the plaintiff to further litigate to compel by a legal proceeding the payment of the amount found due by the court. There is no good reason why the amount due the plaintiff should not be paid. The defendants admit that there is a balance of \$1,486.76 in the fund applicable to the payment of this claim. There is evidence that there is a balance of \$5,352.32 in the hands of the Village since the construction of the improvement and the payment of the claims for such construction. The defendants admit that this amount should be used to reduce the indebtedness of the creditors, but the plaintiff contends that no claim is being made by other creditors to this fund, and that the amount is in the hands of the Village and should be applied in payment of the plaintiff's claim.

The Village further resists the use of this fund and urges this theory: That the bondholders as a class are entitled to have this balance applied in payment of their bonds. The answer is that there is no claim made by any of the bondholders other than the claim made in this litigation. The evidence in the record is sufficient to sustain the decree of the court that the Village had sufficient funds to pay the amount due the plaintiff.

The decree finds that the defendant, the Village of Oak Lawn, up to March 15, A. D. 1932, paid on account of the principal of bonds maturing on said date and prior thereto the sum of \$4,875.00, and paid on account of interest maturing on said date and prior thereto the sum of \$2,400, being a total paid out amounting to \$14,075,

Ex. 1 and Ex. 2 \$1,000
 Ex. 3 and Ex. 4 500
 Ex. 5 and Ex. 6 500

It further appears from the list of sales to the

attention that the total amount for the principal and
 interest found in the account, as shown in Ex. 1, is
 for bonds maturing on March 1, 1904, and \$1,000.00 for bonds
 maturing on March 1, 1905, including interest.

After completion of the statement of the following

will be found on hand the sum of \$1,000.00, which consisted of interest
 received on bank deposits and the difference between the cost of
 the mortgage system and the proceeds from the sale of the bonds.
 When the statement of bonds is further examined, it is
 observed that, thirty days prior to the date of the completion
 herein, there was a sum in the treasury of the Village of \$1,000.00
 in the sum of \$1,000.00.

The balance carried forward from the trial court being entered
 a sum of \$1,000.00 against the balance carried forward from the
 trial court, the sum of \$1,000.00 will be found to be
 within thirty days.

The balance carried forward from the court having been the
 amount found on the trial court for the balance due on the mortgage
 bonds of the Village, together with interest thereon up to the
 date of the entry of the decree by the court, and further that the
 sum of \$1,000.00 is directed by the court to be paid to
 the Village of New York by the defendant Village of New York after
 the entry of the decree, and also in directing that certain amounts
 be paid to the Village of New York by the defendant Village of New York
 after a verdict and say the amount found by the plaintiff by the
 court.

To this conclusion of the statement of the plaintiff answers
 that the finding proposed is not in conformity with the facts
 having seemed jurisdiction for the purpose, and that the plaintiff

for all purposes, in order to administer complete justice.

This is the general rule followed by courts of equity, and it would seem that to enter a decree for the amount admitted due the plaintiff, without any further relief, would deprive the plaintiff of any means necessary to collect the amount from the defendant village, and in order to collect the moneys due it would be necessary for the plaintiff to further litigate to compel by a legal proceeding the payment of the amount found due by the court. There is no good reason why the amount due the plaintiff should not be paid. The defendants admit that there is a balance of \$1,486.76 in the fund applicable to the payment of this claim. There is evidence that there is a balance of \$5,352.32 in the hands of the Village since the construction of the improvement and the payment of the claims for such construction. The defendants admit that this amount should be used to reduce the indebtedness of the creditors, but the plaintiff contends that no claim is being made by other creditors to this fund, and that the amount is in the hands of the Village and should be applied in payment of the plaintiff's claim.

The Village further resists the use of this fund and urges this theory: That the bondholders as a class are entitled to have this balance applied in payment of their bonds. The answer is that there is no claim made by any of the bondholders other than the claim made in this litigation. The evidence in the record is sufficient to sustain the decree of the court that the Village had sufficient funds to pay the amount due the plaintiff.

The decree finds that the defendant, the Village of Oak Lawn, up to March 15, A. D. 1932, paid on account of the principal of bonds maturing on said date and prior thereto the sum of \$4,675.00, and paid on account of interest maturing on said date and prior thereto the sum of \$9,400, being a total paid out amounting to \$14,075,

and that the excess of moneys received and in the hands of the defendant, the Village of Oak Lawn, for the payment of bonds and interest over and above the amount paid out by the Village of Oak Lawn on principal and interest amounts to \$10,401.01, and that the defendant, the Village of Oak Lawn, now has, or should have, in its possession in the Waterworks bond and interest account the said sum of \$10,401.01, out of which said sum the plaintiff, the Chicago Landscape Company, a corporation is entitled to be paid the said sum of \$4,360.61, this being the balance of the principal amount due the plaintiff on the bonds owned by it and interest up to the date of the entry of the decree, and that said sum should bear interest at five per cent (5%) per annum from April 15, 1936 until paid.

The defendants also object to that part of the decree which provides for the payment of the master's fees to the master in chancery to whom the cause was referred, and who filed his report. This direction by the court was erroneous and will be remanded to the trial court to be modified.

Defendants lay considerable emphasis upon the finding of the court that the amount found due be paid within thirty days from the entry of the decree, and offer as an explanation of their position that the law is well established by the authorities of this State that no execution shall issue upon the entry of a judgment in order that a levy may be made upon the property owned by a municipality. That is true. The decree, however, only provides that the amount due shall be paid to the plaintiff within thirty days from the date of the entry of the decree. This provision is not self-executing, and we are unable to consider the direction as being in effect that a levy may be made upon the property owned by the Village of Oak Lawn.

and that the amount of money received and in the hands of the
defendant, the Village of Carleton Place, for the purpose of paying the
interest over and above the amount paid by the Village of Carleton
Place on principal and interest amounts to \$15,401.01, and that the
defendant, the Village of Carleton Place, has, on several days, in
the possession of the money paid and interest amounts to
the sum of \$15,401.01, and at other times has the same, and
Chicago Landmark Company, a corporation is entitled to be paid
the said sum of \$15,401.01, and being the balance of the principal
amount due the plaintiff in the bonds issued by it and interest up
to the date of the entry of the decree, and that said sum should
be paid interest at five per cent (5%) per annum from April 15, 1928
until paid.

The defendant also objects to that part of the decree
which provides for the payment of the master's fees to the plaintiff
in attorney's fees when the same are certified, and that said fees
be paid. This objection is to the part of the decree and will be
referred to the trial court to be decided.

Defendant also objects to the finding of
the court that the money found due be paid within thirty days
from the entry of the decree, and also as an explanation of their
position that the law is well established by the authorities of
this State that no execution shall issue upon the writ of a
judgment in order that a levy may be made upon the property found
by a municipality. That is true. The law, however, only
provides that the money shall be paid to the plaintiff within
thirty days from the date of the entry of the decree. This
provision is not self-executing, and so the court is authorized the
direction as being in effect that a levy may be made upon the
property owned by the Village of Carleton Place.

Objection is made by the defendants that the decree directs that the President and Board of Trustees of the Village of Oak Lawn, its officials, direct the Clerk of the Village, Albert J. Smutney, to issue a voucher for the sums and interest, payable to the plaintiff. The objection is made on the ground that the court had no jurisdiction of the President or of the Board of Trustees of the Village, they not being parties to the case. No complaint seems to have been made by the special appearance of the parties named, and therefore the defendants here on appeal are not in a position to complain. Since there was no service of summons upon the President and Board of Trustees of the Village, the court was without jurisdiction to act, and this court will not consider the point.

The decree is reversed and the cause is remanded to the trial court with directions to modify the decree in order to comply with the views expressed in this opinion.

REVERSED AND REMANDED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

Objection is made by the respondents that the evidence
 almost that the respondents are not at present at the village of
 one town, the officials, almost all of the village, almost all
 property, to issue a receipt for the same and interest, payable to
 the village. The objection is made on the ground that the same
 had no jurisdiction of the property of the village of respondents
 of the village, they are being made in the case. The respondents
 seem to have been made by the special agreement of the village
 board, and therefore the respondents have no special law but in a
 relation to the village. Since there was no receipt of property from
 the respondents and board of trustees of the village, the court is
 almost satisfied to say, and this court will not consider the
 same.

The court is satisfied and the case is remanded to the
 trial court with directions to advise the parties to enter in writing
 with the clerk of the court.

RECEIVED AND RETURNED.

WILLIAM A. DILLON AND SONS, ATTORNEYS.

33276

JOSEPH MAGOG,

(Plaintiff) Appellee,

v.

ALBERT J. HORAN, Bailiff etc., et al.

Defendants,

On Appeal of HUGO E. FELDE,

(Defendant) Appellant.

10/60
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APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

292 I.A. 631²

MR. PRESIDING JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant Hugo E. Felde from a decree entered by the court based upon the facts stated in the bill of complaint. Plaintiff prays in his bill that a decree be entered declaring redemption by the defendant of the premises involved null and void, because of the failure of the defendant to deposit with the bailiff of the Municipal Court of Chicago the amount of taxes and interest paid by the plaintiff, and enjoining the defendant from enforcing the collection of his judgment from the proceeds of the sale of the property.

An answer was filed to the bill by the defendants, and a hearing was had by the court. On July 18, 1936, a decree was entered finding that the plaintiff was the owner of the Master's certificate; that prior to the redemption he paid the general taxes in the sum of \$1,899.09; that he filed with the Master in Chancery tax receipts for said payments; that the defendant Hugo E. Felde obtained a judgment in the Municipal Court of Chicago for \$267.40, and directed the levy of an execution by the bailiff of the Municipal Court upon the interest of Joseph Koukalik in the property involved herein, and paid to the bailiff for redemption of the premises the sum of \$3,225, but did not pay the bailiff any part of the general taxes as required by statute;

1881 A.D.

THE PROCEEDINGS OF THE COURT OF COMMONS IN THE
 MATTER OF THE PETITION OF THE
 LORDS OF THE PARLIAMENT OF GREAT BRITAIN
 FOR THE REPEAL OF THE ACT IN THAT BEING
 PASSED IN THE SEVENTH YEAR OF THE REIGN OF
 HER MAJESTY QUEEN VICTORIA IN THE FIRST
 YEAR OF HER MAJESTY'S PRESENT REIGN
 ENTITLED "AN ACT TO AMEND THE LAW
 RELATIVE TO THE RIGHTS OF THE
 COMMONS OF GREAT BRITAIN IN
 PARLIAMENT ASSEMBLED."
 IN THE FIRST YEAR OF HER MAJESTY'S
 PRESENT REIGN.

that the said redemption was of no legal force and effect because of the failure to pay said taxes; that the legal owner and holder of the Master's certificate was entitled to a Master's deed to said premises; that the plaintiff, Joseph Magoo was entitled to a permanent injunction enjoining the defendant Albert J. Horan, the bailiff of the Municipal Court of Chicago from selling the right, title and interest of Joseph Koukalik in and to the property involved herein, and enjoining the defendant Hugo E. Felde from enforcing the collection of his judgment from the proceeds of the sale of the property.

The theory of the plaintiff is that the redemption by the defendant Hugo E. Felde is null and void for the reason that he did not deposit with the bailiff the amount of the taxes and interest thereon to which the plaintiff was entitled under the statute, in the sum of \$1,898.09 and interest thereon.

To this contention the defendant Hugo E. Felde answers that the plaintiff was not entitled to any amount of the taxes paid, for the reason that he did not file tax receipts with the Master in Chancery for said payments as required by the statute, and for the further reason that at the time the redemption herein was made, the records in the office of the county collector showed that the said taxes were paid by Joseph Koukalik, one of the owners of the equity of redemption, and therefore the plaintiff was not entitled to be reimbursed for the payment of said taxes.

The facts are that Joseph Koukalik and Barbara Koukalik, husband and wife, were the owners of the property involved herein as joint tenants. The property in question was involved in a foreclosure proceeding in the case entitled Joseph Vyberny v. Joseph Koukalik, et al. Circuit Court No. E-271466, and during the proceedings, a decree was entered directing the sale of the property to satisfy the amount

involved. On October 29, 1934, pursuant to the decree, the property was sold at public auction by the Master to Joseph Vyborny, the plaintiff, in that action, for the sum of \$6,000, and a Master's certificate was issued to him. On April 26, 1935, this certificate of sale was assigned by Joseph Vyborny to Joseph Nagee, the plaintiff herein. During the month of May, 1935, general taxes for the years 1931, 1932 and 1933 were paid on said property amounting to \$1,899.09. Receipts to show payment of the taxes were left at the office of the Master by the attorney for the plaintiff and were thereafter returned by the Master to the plaintiff; they are still in his possession.

On December 12, 1935, the defendant herein, Hugo E. Felde, obtained a judgment in the Municipal Court of Chicago for the sum of \$287.44 against the said Joseph Koukalik. An execution was issued upon the application of this defendant, based upon the judgment described above, and on January 29, 1936, the execution was placed in the hands of the bailiff of the Municipal Court of Chicago, and a levy was made on Joseph Koukalik's interest in the property in question. Thereafter the defendant Hugo E. Felde deposited with the bailiff of the Municipal Court of Chicago the sum of \$3,225, being one-half of the sale price and interest thereon for the redemption from the sale held on April 26, 1935. Upon advice of counsel for the defendant Hugo E. Felde, a tax search was made by the Title Search Corporation of the property involved herein, and from its report of December 5, 1935, it is claimed that the taxes on said property for the years 1931, 1932, and 1933, were paid by Joseph Koukalik. It also appears from the evidence offered by this defendant that a witness named Fred Polacek, an attorney, examined the tax books in the office of the county treasurer with reference to the taxes on the property, and testified the books disclosed that the general taxes for the years 1931, 1932, and 1933 were paid by Joseph Koukalik.

The question as to who made payment of the taxes is a

[illegible]

controverted one. From the evidence it appears that the tax books, which are a part of the records of the county treasurer's office, show that a line was drawn through the name of Koukalik and the name of the plaintiff inserted.

As we have already indicated in this opinion, the theory of the plaintiff is that the redemption by the defendant Hugo E. Felde is null and void for the reason that he did not deposit with the bailiff, in addition to the sum of \$3,000 and interest, the amount of the taxes in the sum of \$1,899.09 and interest thereon, which the plaintiff claims he is entitled to under the statute.

It appears from the record in this case that Joseph Koukalik was the owner of an undivided one-half interest in the property in question, and that the defendant in this action deposited the sum of \$3,000 and interest for redemption of this undivided one-half interest of Joseph Koukalik in the property in question.

This amount shown as deposited with the bailiff of the Municipal Court of Chicago by this defendant was permitted under Sec. 26, Ch. 77, Cahill's Ill. Rev. Sts. 1933, relating to judgments, decrees and executions, wherein it is provided that

"Any joint owner, his executors, administrators or assigns, or a decree or judgment creditor of such joint owner, may redeem the interest of such joint owner in the premises sold on execution or decree, * * *, upon the payment of his proportion of the amount which would be necessary to redeem the whole."

The sole question is as to the payment of the amount of taxes and assessments claimed to have been made by the plaintiff in this case during the period of redemption, as provided for by Sec. 27a of Par. 28, Ch. 77, as follows:

"Whenever any real estate is sold under any judgment or decree of any court, the holder of the certificate of such sale shall have the right to pay all taxes and assessments which are or may become a lien on such real estate during the time of redemption running on such sale, and whenever redemption is made from such sale the party or parties entitled to redeem shall pay to the holder of such certificate of sale, or to the sheriff, master in chancery or other officer who sold

the same, or his successor in office, in addition to the amount due on such certificate, the amount paid by the holder thereof for such taxes and assessments, together with interest thereon at the rate of six per centum per annum, if before such redemption is made a receipt or receipts for such taxes or assessments shall be filed with the sheriff, master in chancery or other officer who made such sale or exhibited by the holder of such certificate in case redemption is made directly to the holder of such certificate."

That the taxes amounting to \$1,898.09 for the years 1931, 1932, and 1933, were paid on the property in question is not disputed. The defendant's contention as to such payment is that it was made by Joseph Koukalik the undivided one-half owner of the property at the time the foreclosure proceedings were instituted. It is therefore important to consider the evidence and determine whether it would have been reasonable for the owner of the undivided one-half interest to pay these taxes after foreclosure.

A bill of foreclosure was filed, and in pursuance of a hearing, a decree was entered on October 2, 1934, and thereafter a sale of the property was had, and the master in chancery issued his certificate of sale, dated October 29, 1934, by which the master in chancery certified that the property was sold to Joseph Vyborny, the plaintiff in the foreclosure proceeding, for \$6,000, and that the purchaser would be entitled to a deed upon the expiration of 15 months, or January 30, 1936. On the reverse side of the master in chancery's certificate appears an assignment thereof, dated April 26, 1935, from Joseph Vyborny to Joseph Magoc, the plaintiff in this proceeding.

There is evidence that during the period of redemption and prior to January 30, 1936, tax receipts were deposited with the master in chancery, and that he kept a record of these tax receipts, which were deposited with him on May 21, 1935.

Plaintiff's exhibits 2 and 3 are photostatic copies of tax bills showing that the 1933 first and second installments of the general taxes in the sums of \$119.02 and \$115.57, respectively, were

paid on May 2, 1935, and on each of the bills appears the name of Jos. Koukalik, 4041 West 26th Street, and lines drawn over the name and address and the name of Jos. Magee, 2439 S. Trumbull Avenue written in.

Plaintiff's exhibits 4 and 5 are likewise photostatic copies of tax bills showing that the 1931 first and second installments of the general taxes were paid on May 17, 1935, in the sum of \$1206.63 and \$196.52, respectively.

Plaintiff's exhibits 6 and 7 are photostatic copies of tax bills showing that the 1932 first and second installments of the general taxes were paid on May 17, 1935, in the sum of \$145.93 and \$115.42, respectively, and on each of these bills appears the name of Joseph Magee, 2439 S. Trumbull Ave.

The defendant in this action contends that the general taxes for the years 1931, 1932, 1933, were paid on the property amounting to \$1,899.08, and that these receipts showing payment of the taxes were left with the master in chancery by the attorney for the plaintiff, and thereafter returned to the plaintiff; that the plaintiff did not file the tax receipts with the master in chancery as required by statute, and that at the time the redemption was made, the record shows the taxes were paid by Joseph Koukalik, one of the owners of the equity of redemption. Therefore the plaintiff is not entitled to reimbursement for the payment of said taxes.

It does not seem reasonable in view of the facts appearing in the record that the defendant in the foreclosure proceeding would pay these accrued taxes after the filing of the bill of foreclosure sale and the certificate of sale had been issued to the plaintiff by assignment.

The records of the County Treasurer were examined by the defendant for the purpose of determining whether taxes had been paid during the pendency of the foreclosure proceedings up to the time he

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paid to the bailiff of the Municipal Court of Chicago the sum of \$3,225, being one-half of the sale price and interest thereon. This investigation by the defendant was made on December 5, 1935, and again on January 29, 1936, and he contends that according to the evidence the taxes appear to have been paid by Joseph Koukalik. As we have already indicated, the taxes were paid by the attorney for the plaintiff in May, 1935, and the funds of the plaintiff were used to pay the taxes for the years 1931, 1932, and 1933. The court found in its decree that the plaintiff paid the taxes for these years, and, from what appears in the record, it would seem most unreasonable for the court to find that the defendant in the foreclosure proceeding had paid these taxes long after the property had been sold and a certificate of sale issued by the master in chancery.

The defendant also points to the fact that these tax receipts were not filed with the master in chancery, as, he contends, was required by that part of the section of the statute above quoted. It does appear from the evidence, however, that the plaintiff, through his attorney, filed these tax receipts with the master in chancery to whom the cause had been referred in the foreclosure proceeding, and the master in chancery made a memorandum on the file in this case in his office regarding the payment of these taxes by the plaintiff. The defendant contends that in the filing of receipts the statute requires that they remain in possession of the master in chancery. This we think is not a fair construction of the statute in question, for the reason that it also provides that if the redemption is made by the payment of the amount due the holder of the certificate of sale it is necessary that the receipts be exhibited. As a matter of fact, the statute of our State requires that deeds and instruments transferring title to real estate be recorded in the county in which the property is situated, and after

the recording of these documents, returned to the person named as grantee in the deed, or to his or her agent. No doubt we are all familiar with the rule that original notes and trust deed may be withdrawn in a foreclosure proceeding upon filing copies thereof with the master in chancery. Then would it not be unreasonable to say that upon the filing of these tax receipts with the master in chancery, they could not be withdrawn for the purpose of preservation. In any event, it is apparent from the evidence that the plaintiff did pay the taxes and the master in chancery had knowledge that these payments were made in the amounts endorsed by him on his file, so that it would seem but reasonable, if the defendant wished to redeem, that he apply to the master in chancery to whom the foreclosure proceeding was referred to ascertain if the taxes had been paid, and get this information from the files of the master in chancery in his office.

It is our opinion that the decree of the court upon this question is sustained by the evidence in the record, and that the defendant, in addition to the amount deposited by him with the bailiff of the Municipal Court of Chicago with directions to levy on Joseph Koukalik's interest in the property in the foreclosure proceeding, should have included the amount of taxes paid by the plaintiff.

It appears, too, that during the course of the trial and before the entry of the decree here on appeal, the defendant made a tender long after the period of redemption had expired, which was properly refused for the reason that the plaintiff was entitled to a deed.

The decree in this case is affirmed.

DECREE AFFIRMED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

39350

PEOPLE OF THE STATE OF ILLINOIS,
ex rel., JOHN S. RUSCH,

(Petitioner) Appellee,

v.

ANNA TROWIG, RALPH D. HEFFORD and
MARIE KEELEY,

(Respondents) Appellants.

APPEAL FROM

COUNTY COURT OF

COOK COUNTY.

292 I.A. 631³

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF
THE COURT.

This cause is in this court upon a petition for leave to appeal, which petition was allowed. The purpose of the appeal is to have reviewed the record of the County Court of Cook County, wherein respondents were found guilty of contempt as officers of the court by the judge presiding, because of their misbehavior and misconduct in office as election officials while acting as judges of election and members of the Board of Registry in the 40th Precinct in the 29th Ward in the City of Chicago.

It appears from the record that on the 7th day of April, 1936, a verified petition was filed in the County Court of Cook County in the name of the People of the State of Illinois on the relation of John S. Rusch, Chief Clerk of the Board of Election Commissioners of the City of Chicago, alleging that on the 17th day of March, 1936, a registration of the electors residing in the City of Chicago was had in the 40th Precinct in the 29th Ward in the City of Chicago, for the primary election to be held on the 14th day of April, 1936, in the City of Chicago.

It was alleged that the respondents while acting as members of the Board of Registry, wilfully, fraudulently and unlawfully permitted and acquiesced in permitting names to be placed upon the two registry books furnished to them by the Board of Election Commissioners.

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STATE OF ILLINOIS
COUNTY OF COOK

(Testimony) Verdict

v.

ABRAHAM LINCOLN, et al.
vs. JOHN F. KELLY

(Verdict) Verdict

STATE OF ILLINOIS
COUNTY OF COOK

vs. JOHN F. KELLY

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W. J. KELLY, et al. vs. JOHN F. KELLY

THE COURT.

There is in this court upon a petition for leave to
appear, this petition was allowed. The purpose of the appeal is
to have reviewed the record of the County Court of Cook County,
wherein respondents were found guilty of contempt in violation of
the order of the Judge presiding, because of their disobedience
and contempt in office as elected officials while acting as judges
of election and members of the board of directors in the County Court
in the year 1900 in the City of Chicago.

It appears from the record that on the 1st of April,
1900, a verified petition was filed in the County Court of Cook
County in the name of the people of the State of Illinois on the
relation of John F. Kelly, Chief Clerk of the Board of Election
Commissioners of the City of Chicago, alleging that on the 17th day
of March, 1900, a registration of the electors residing in the City
of Chicago was held in the North Division in the year 1900 in the
City of Chicago, for the primary election to be held in the year
1900, in the City of Chicago.

It was alleged that the respondents were acting as
members of the board of directors, officials, respondents and un-
officially permitted and authorized in providing means to be taken
when the two parties began threatened to leave the Court in
election Commissioners.

It was further alleged that each of the respondents willfully, fraudulently and unlawfully permitted and acquiesced in permitting names of individuals to be placed upon the two registry books, and each of them knowingly and corruptly placed the names and history of the individuals upon the registry books without the individuals being personally present and being under oath administered by the respondents constituting the Board of Registry.

On April 7, 1936, an order was entered granting leave to file the petition and ordering that the respondents, and each of them, show cause, and that they appear to answer said charges.

On April 16, 1936, the respondents filed a joint verified answer in which they denied the allegations of the petition.

Thereafter on April 24, 1936, upon a hearing, the respondents were each found guilty in the County Court of Cook County of misbehavior and misconduct in office as election officials, and each of them was sentenced for contempt of court for a period of six months.

The petitioner contends that the evidence produced in the County Court established a conspiracy between Antoinette Trambley, who was produced for the People, Alderman Terrell and the respondents, to illegally, unlawfully and fraudulently place the names of Clyde Jones, Earl Jones and Kenneth Jones on the registry books of the 40th Precinct of the 29th Ward.

The evidence offered by the petitioner is that Antoinette Trambley went to the home of Esther Jones, the wife of Earl Jones, sister-in-law of Clyde Jones, and mother of Kenneth Jones, on March 16, 1936, the day before registration day, and Mrs. Jones wrote down the names of her husband, brother-in-law and son on a piece of paper with their respective histories, and gave the paper to Mrs. Trambley, who took it to Alderman Terrell. On March 17th, the day of the registration, Mrs. Trambley went to Mrs. Jones' house and accompanied her to the polling place, and after Mrs. Jones registered,

It was further alleged that each of the respondents fully, truthfully and voluntarily testified and acknowledged in writing the contents of the affidavits to be filed with the county clerk, and each of them knowingly and voluntarily signed the same and history of the individuals upon the registry books without the individuals being personally present and being aided with advice by the respondents constituting the board of registry.

On April 7, 1900, an order was entered directing leave to file the petition and ordering that the respondents, and each of them, show cause, and that they appear to answer said charges.

On April 12, 1900, the respondents filed a joint verified answer in which they denied the allegations of the petition.

Thereafter on April 26, 1900, when a hearing was taken, the respondents were found guilty in the County Court of Cook County of misbehavior and misconduct in office as election officials, and each of them was sentenced for a term of one year to a term of six months.

The petition contains that the evidence presented in the County Court established a conspiracy between respondents Trembley, who are charged for the people, William Turner and the respondents, to illegally, unlawfully and fraudulently place the names of John Jones, Earl Jones and Thomas Jones on the registry books of the 40th precinct of the 10th ward.

The evidence offered by the petitioners in their affidavits Trembley and to the names of John Jones, the wife of Earl Jones, sister-in-law of John Jones, and mother of William Jones, as each is, 1900, the day before registration day, and that Jones wrote down the names of her husband, brother-in-law and son as a piece of paper with their respective addresses, and gave the paper to Mrs. Trembley, and that it is a written receipt. On March 17, 1900, day of the registration, Mrs. Trembley went to Mr. Jones' house and accompanied her to the polling place, and after Mrs. Jones' name was

Mrs. Jones and Mrs. Trambley walked out of the polling place followed by Mefford, one of the respondents, who said: "The names are O.K." At the time Mrs. Jones appeared at the polling place accompanied by Mrs. Trambley she learned for the first time that her husband, son and brother-in-law were registered and that Mrs. Trambley told her of this fact about five o'clock in the afternoon of the day of registration. The names as they appear on the registers, which were offered in evidence, are as follows:

In one of the registers provided for by law, where the names appear in alphabetical order under the letter J, the following names appear:

Line 5, Clyde Jones 30 St. Louis Ave. age 21
 Line 6, Earl Jones 30 St. Louis Ave. age 46
 Line 7, Kenneth Jones 30 St. Louis Ave. age 23
 Line 8, Esther Jones 30 St. Louis Ave. age 21

In the other register required by law to be kept, the names appear, but not under the letter J, as follows:

Line 15, Clyde Jones 30 St. Louis Ave. age 21
 Line 16, Earl Jones 30 St. Louis Ave. age 46
 Line 17, Kenneth Jones 30 St. Louis Ave. age 23
 Line 18, Mrs. Elizabeth Johnson 28 So. St. Louis Ave.
 Line 19, Esther Jones 30 St. Louis Ave. age 21

In the public register required by law to be kept, the following names appear under the letter J:

Line 10, Esther Jones
 Line 11, Clyde Jones
 Line 12, Earl Jones
 Line 13, Kenneth Jones.

The respondents when called as witnesses denied that they placed any names on the registers except the names of the persons who appeared before them.

The question which we will now consider is whether the finding and judgment of the trial court is contrary to the manifest weight of the evidence.

The respondents contend not alone that the finding and

Mr. James and Mrs. Crowley advised out of the following place mentioned
by letter, one of the witnesses, who said: "The house was 111."
at the time the body was found of the following place mentioned
by Mr. Crowley who stated for the first time that the house
was and another-in-law with neighbors and that Mrs. Crowley told
her at some time about the place as the statement of the day of
investigation. The house as they appear on the register, which were
offered in evidence, are as follows:

In one of the registers provided for by law, which the house
appear in alphabetical order under the letter A, the following

names appear:

Line 1, Clyde James 30 St. Louis Ave. age 31
Line 2, Earl James 30 St. Louis Ave. age 32
Line 3, Kenneth James 30 St. Louis Ave. age 33
Line 4, Robert James 30 St. Louis Ave. age 34

In the other register provided by law to be kept, the names

appear, but not under the letter A, as follows:

Line 15, Clyde James 30 St. Louis Ave. age 31
Line 16, Earl James 30 St. Louis Ave. age 32
Line 17, Kenneth James 30 St. Louis Ave. age 33
Line 18, Robert James 30 St. Louis Ave. age 34
Line 19, Robert James 30 St. Louis Ave. age 35

In the public register provided by law to be kept, the

following names appear under the letter A:

Line 10, Robert James
Line 11, Clyde James
Line 12, Earl James
Line 13, Kenneth James

The witnesses who were called as witnesses during the trial
placed my words on the registers except the names of the persons
and appeared before them.

The question which is now presented is whether the
finding and judgment of the trial court is contrary to the admitted
weight of the evidence.

The evidence contained and shown that the finding and

judgment is contrary to the manifest weight of the evidence, but that they are presumed to be innocent until their guilt is established beyond a reasonable doubt.

The rule applicable to the proof in cases of this character is controlled largely by a provision of the Election Laws, wherein it is provided by Sec. 13, par. 267, ch. 46, Cahill's Ill. Rev. St. 1933, in part as follows:

"Upon the confirmation of such judges and clerks, at any time, a commission shall issue to each of such judges and clerks, under the seal of such court, and appropriate forms shall be prepared by said board of commissioners for such purpose. And after confirmation and acceptance of such commission, such judges and clerks shall thereupon become officers of such court and shall be liable in a proceeding for contempt for any misbehavior in their office, to be tried in open court on oral testimony in a summary way, without formal pleadings, but such trial or punishment for contempt of court shall not be any bar to any proceedings against such officers, criminally, for any violation of this act."

It is to be noted that a proceeding for contempt for any misbehavior in office is to be tried in open court on oral testimony of witnesses, and without the necessity of formal pleadings.

The charge of contempt against the officers in this case is purely a statutory one. The respondents who are here heard on appeal, when they accepted the office of judges and clerks of election became officials of the County Court, and the court is vested with power to punish an election official for misbehavior and misconduct in office, as provided by Section 13 above quoted. In a discussion of the punishment for contempt as provided by this section of the Election Act, this court in the case of People ex rel Rusch, v. Greenzeit, 277 Ill. App. 479, said:

"In this State, in a proceeding for criminal contempt, if the party purges himself of the alleged contempt by his answer he is discharged, and it would be improper for the court to allow a traverse of the answer, or for the court to hear evidence touching the charge. Under section 13 a proceeding for contempt does not involve a criminal contempt as that term was understood at common law. (See People v. White, 334 Ill. 465.) The county court, at common law, had no jurisdiction to punish judges and clerks for misbehavior

in office, but it obtained such jurisdiction from the City Election Act. That act does not provide or contemplate, in our judgment, that a petitioner would have to prove 'misbehavior' of an election official beyond a reasonable doubt, and the mere fact that the petition contains allegations (*inter alia*) that amount to a charge of an act or acts of a criminal nature does not cast upon the petitioner the burden of proving the respondents guilty beyond a reasonable doubt. In People ex rel Busch v. Rivlin, 277 Ill. App. 183, we held, in a like case, that the petitioner was not required to prove the guilt of a respondent beyond a reasonable doubt. The power to punish an election official for contempt for 'misbehavior', even though such behavior involves an act or acts of a criminal character, is vested in the county court, by section 13, but such a proceeding would not prevent a prosecution under the Criminal Code, of the official for such act or acts."

In the consideration of the question as to whether the order finding the respondents guilty of contempt of court is against the manifest weight of the evidence, it becomes necessary to consider the evidence offered upon the question of misbehavior and misconduct of the judges and clerks in this office. The respondents, as we have stated in our opinion, were charged with having permitted the names of persons to be placed upon the registry books furnished to them by the Board of Election Commissioners, who did not appear in person to register, take oath, and answer the questions provided by law.

From the facts it appears that Clyde Jones, Earl Jones, and Kenneth Jones, who lived at 30 South St. Louis Avenue, in the 40th Precinct of the 29th Ward, Chicago, did not appear in person on the registration day provided for by law. There is evidence that Mrs. Esther Jones appeared and registered and qualified as a voter in this precinct. There is also evidence that one Antoinette Trambly obtained the names of these three men, and on the date of the registration when Mrs. Jones was registered she learned that these names appeared on the registry books. The question here, as we gather from the evidence, is whether the judges of election unlawfully added the names to the registry books in the absence of the persons whose names were placed on the registry, or whether someone did appear and

register in their names on this particular day. The three judges have denied that any names were added to the registry list unless the individuals appeared in person and were sworn to answer the prescribed questions.

Two officials of this Board were not charged with any misbehavior. They were acting as clerks of election. One of them, named Ethel Spiker, testified that she officiated as clerk of election in that particular precinct, and from her evidence it appears that the names of Clyde Jones, Earl Jones, and Kenneth Jones, appear on the registry books and are in her handwriting. Upon the question of the appearance of persons who applied for registration, she testified that -

"On March 17th, 1936, for the names appearing on that book as being registered on that day, in my handwriting, some person did positively appear for each and every name put in that book. If they hadn't appeared they wouldn't have been put on the books."

Margaret Collins, who was called as a witness on behalf of the People and was one of the clerks of election in that particular precinct, testified in substance that the names of Clyde Jones, Earl Jones, Kenneth Jones, Elizabeth Johnson, and Esther Jones in one of the registry books were all in her handwriting; that she wrote the names of those appearing for registration and only when they appeared before the Board of Election.

The evidence of these two clerks was not questioned; but, on the contrary, from all that we can determine, was in keeping with the facts, when considered together with the testimony of the election judges who testified that only persons appearing before the Board were registered and their names placed upon the registry books.

The testimony of Antoinette Trambley has special bearing in this case. She testified that she obtained the names of Clyde Jones, Earl Jones, and Kenneth Jones, from Mrs. Jones at her home. There is some dispute as to whether Mrs. Jones wrote the names on a piece of

The following is a list of the names of the persons who have been identified as having been in contact with the subject of this investigation, and who have been identified as having been in contact with the subject of this investigation, and who have been identified as having been in contact with the subject of this investigation.

The following of this report was not changed with the
 identified. They were added in order to identify. One of them
 named John Smith, residing in the village of Clark of
 residence in the historical records, and from the records in
 reports that the name of John Smith, and John Smith, and
 reports in the village records and in the historical records.
 question of the residence of persons who lived in the village.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. This is a serious omission, as the Commission is required to report on the activities of all such organizations.

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The evidence of these two classes was not contradictory; and on the contrary, from all that we can ascertain, was in perfect accordance with the testimony of the classical judges and Aristotle as to only human knowledge before the world was enlightened and their minds cleared from the material world.

The findings of the investigation are as follows:

paper, or whether Mrs. Trambley took the names as they were given and wrote them down on a memorandum. There is evidence that Mrs. Trambley took a list of these names and delivered them to Alderman Terrell, of this ward. Just what bearing this had upon the question of the misbehavior of the judges is not clear from the briefs filed in this case. The fact is that no charge was made against Alderman Terrell. He was not subpoenaed as a witness by either side to this litigation, so that we are without light as to just what bearing this had upon the guilt of these three judges of election, and unless the delivery of this list of names to him had some bearing, it is only fair that he should have been subpoenaed as a witness and given an opportunity to explain and not leave the question in doubt.

We have considered the facts in this case and are satisfied that the order entered here is against the manifest weight of the evidence. The clerks of election who testified seemed to be very clear and positive in their statements on the question of the appearance of the voters for the purpose of registration, and that only individuals who applied for registration in person were added to the books. This supported by the interested parties, the judges of election, leaves some doubt in the minds of this court as to the weight of the evidence offered and received in the case by the testimony of the witness Trambley. While it is true from the record that Clyde Jones, Earl Jones, and Kenneth Jones, did not appear in person, it is not altogether clear but that some person did appear and assume their names.

As we have stated before, we are of the opinion that the order entered finding the respondents guilty of contempt of court is against the manifest weight of the evidence, and for that reason the order is reversed and the cause is remanded for another trial.

REVERSED AND REMANDED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

39367

GILBERT NELSON,

Appellant,

v.

J. WEINER, HARRY REISIN and HERVIN S.
NELSON,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

292 I.A. 632

MR. PRESIDING JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff who filed an action in the Circuit Court of Cook County wherein the plaintiff filed a bill of interpleader against certain defendants, praying that the ownership of a certain bond in the possession of the plaintiff be determined, and that an action then pending in the Municipal Court of Chicago by one of the defendants be stayed until the matters and things set up in said bill of interpleader be determined by the court.

In the amended bill of complaint it appears that the plaintiff is a duly licensed practicing attorney in the City of Chicago, County of Cook and State of Illinois, and has been for over eight years last past; that on or about the 17th day of August, A. D. 1932, J. Weiner, one of the defendants herein, delivered to Abe Nelson one gold bond No. 23 signed by Philip Ram and Rose Ram, his wife; and that attached thereto were certain extension interest coupons and an extension agreement signed by one Marek Kraus and Nettie Kraus, his wife, and Gladys Brown and Isidore Brown, her husband, said bond bearing date February 5, 1934, and bearing interest at the rate of six and one-half per cent per annum until maturity, payable semi-annually, on to-wit: the 5th day of February and the 5th day of August in each succeeding year.

That on to-wit: the 17th day of August, A. D. 1932, the defendant, J. Weiner, delivered to this plaintiff said above described bond for and on behalf and the use of Abe Nelson, who, as holder of the same, was to institute foreclosure proceedings upon said bond,

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which was then and there in default, and that the plaintiff herein received said bond on behalf of said Abe Nelson, and did then and there deliver to the said J. Weiner his receipt dated August 17, 1932, bearing No. 825, which said receipt is in words, letters and figures as follows, to-wit:

"No. 825
August 17, 1932.

Received of J. Weiner

1 Gold Bond No. 23 signed by Philip Ram and Rose Ram for
\$500.00 on Home Bank & Trust Co.

(Signed) G. Nelson."

That at the direction of Abe Nelson he did thereafter file foreclosure proceedings against the makers of said trust deed and extension agreement and other bonds secured thereunder, under the provision of said trust deed securing said bond and in accordance with the provisions of the trust deed, which said proceeding was prosecuted to and resulted in a decree of foreclosure; and plaintiff further alleges that since said date the said Abe Nelson died, and that no administrator or executor or administratrix or executrix has been appointed of said estate, but that plaintiff is informed, and so states the fact to be, that one Melvin S. Nelson has taken charge of all matters concerning the affairs of said Abe Nelson, now deceased.

That during the year 1934 one Harry Reisin, without demand nor request, started suit against the plaintiff in the Municipal Court of Chicago, charging that plaintiff, the defendant in said suit, had converted said Bond No. 23 to his own use, which said suit was subsequently dismissed on motion of the plaintiff.

That shortly thereafter the said Harry Reisin again instituted suit in the Municipal Court of Chicago against the plaintiff for the conversion of said bond, the general number of said suit being 2824486, which said suit is now pending and will shortly be reached for trial; plaintiff further alleges that if said suit is

allowed to proceed to trial that he will be compelled to defend the same, and will be put to a great deal of expense therein, and by reason of the fact that J. Weiner, one of the defendants herein, from whom the said bond was received, and who pretends and represents himself to be the owner of said bond, is not made party defendant, and his rights or claims cannot be adjudicated in the said suit pending in the Municipal Court of Chicago, and which said court, by reason of the pleadings therein cannot properly adjudicate the rights, if any, existing as to the ownership of said bond by the said J. Weiner, this plaintiff will not be permitted to make a proper defense in said suit.

That since the filing of the original Complaint in the above entitled cause he has caused to be taken the deposition of the defendants, J. Weiner and Harry Reisin, and, therefore, alleges by reason of the facts obtained in said depositions that the defendant, Harry Reisin, plaintiff in the Municipal Court of Chicago, had full knowledge of all the proceedings upon the foreclosure and the attempt to collect upon said bond, the subject-matter of the suit in the Municipal Court, from the beginning thereof to the date of this Complaint, and this plaintiff further alleges that all proceedings by him for the purpose of attempting to collect on said bond were known by the said defendant Harry Reisin and were consented thereto by the said Harry Reisin and were also known by the counsel representing the said Harry Reisin during all the transactions in connection therewith; and this plaintiff further alleges that when the attempt to collect upon said bond by foreclosure had not resulted successfully that the said Harry Reisin entered into a conspiracy with the defendant, J. Weiner, who is a brother-in-law, as this plaintiff is informed, of said Harry Reisin, for the purpose of instigating a suit in the Municipal Court of Chicago for the alleged conversion of said bond by this plaintiff, whereby plaintiff would be

allowed to proceed to trial until he will be summoned to appear
the case, and will be set at a fixed date of appearance therein, and
by reason of the fact that I believe, one of the defendants herein,
from whom the suit does not proceed, and the proceeds and expenses
likely to be the result of this suit, is not being fully satisfied,
and the rights of others cannot be prejudiced in the suit with
pending in the municipal court of Chicago, and which suit would, by
reason of the fact that certain money property belonging to the
rights, it may, relating to the ownership of said land or the
said suit, this plaintiff will not be prevented by such a proper
remedy in this suit.

That also the filing of the original complaint in the
above entitled cause be not moved to be taken the disposition of the
defendants, I believe and truly believe, and therefore, allege by
reason of the facts stated in said complaint that the defendant,
Darryl Davis, plaintiff in the municipal court of Chicago, and
all knowledge of all the proceedings upon the complaint and the
attempt to collect from said bond, the subject-matter of the suit
in the municipal court, from the beginning thereof to the date of
this complaint, and that plaintiff further alleges that all proceeds
paid by him for the purpose of extending to collect on said bond
were known by the said defendant Darryl Davis and were accounted
for by the said Darryl Davis and were also known by the court
representing the said Darryl Davis during all the proceedings in
connection therewith; and that plaintiff further alleges that when
and attempt to collect upon said bond by force and not lawfully
procure it that the said Darryl Davis received into a bank
with the defendant, D. Davis, who is a brother-in-law, as this
plaintiff is informed, of said Darryl Davis, the proceeds of
including a suit in the municipal court of Chicago for the alleged
conversion of said bond by this defendant, whereby plaintiff would be

estopped from showing all the facts and circumstances in connection with the transactions concerning said bond, and plaintiff further alleges that in pursuance thereof the said defendant Harry Reisin and his present counsel did cause an affidavit to a statement of claim to be signed, as plaintiff is informed, by a stenographer in the office of the present counsel of the defendant Harry Reisin, which said affidavit and statement of claim thereto attached were given to another law firm to institute suit in the Municipal Court of Chicago, and that said suit was started and subsequently dismissed, and then another suit upon the same subject-matter, concerning the same cause of action, was started in the Municipal Court by the present counsel of the said Harry Reisin and is now pending in the Municipal Court of Chicago, and plaintiff alleges that the present counsel of the said Harry Reisin had knowledge of all the facts above set forth and that the said suits heretofore started are simply for the purpose of harassing and embarrassing this plaintiff and for the purpose of depriving him of making a proper defense to said claim.

That he has no right, title or interest in and to said bond, nor has he ever made any claim that he had any right, title or interest in and to said bond; that since the institution of said suit in the Municipal Court of Chicago he has demanded a return of the said receipt given by him, as above set forth, from the said J. Weiner, who has and still does refuse to return said receipt or to authorize this plaintiff to return said bond either to the said J. Weiner or to said Harry Reisin; and that the said Harry Reisin has refused and still does refuse to secure and surrender the said receipt so given to the said J. Weiner, as aforesaid.

That he tendered in open court in the Municipal Court of Chicago the said bond in question to the said Harry Reisin, upon his securing from the said J. Weiner his consent thereto, or upon the production of said receipt in open court, and upon release of the

entered from looking at the boys and circumstances in connection
 with the transaction concerning this case, and finally, perhaps
 almost that in connection with the case mentioned in my letter
 and also perhaps connected with some other activity in a different
 place to be shown, as I believe in the case, or a representation in
 the office of the present owner of the business (my letter).
 which said activity and movement of this business is now
 given to another man than the business was in the business of
 of Chicago, and that with some other and somewhat different
 and that which will give the same impression, however the
 was made at the time, was stated in the business of the
 present owner of the business and in the business of the
 business of the business, and I believe in the business of the
 business of the business and knowledge of all the business
 and that the business is now in the business of the business
 the business of the business and representing this business and the
 business of the business and the business of the business
 that he has no right, right or interest in the business
 business, but he has never made any claim that he has no right, right or
 interest in the business; that about the business of the business
 in the business of the business he has received a share of the
 and which given by him, as shown in my letter, from the time
 business, and he will have no right in the business of the business
 business this business as shown in my letter, from the time
 business as he has been making and that the business of the business
 business and will have no right in the business of the business
 as given to the business, as mentioned.

That he has no right in the business of the business
 business has been in business as the business of the business, from the
 business from the time he has been making, from the time
 business as he has been making, from the time he has been making

said plaintiff from any responsibility in handling of said bond No. 23 above described.

After certain other allegations, the amended complaint concludes with a prayer for relief and that J. Weiner, Harry Reisin and Melvin S. Nelson, who were made parties defendant to the amended complaint, may be required to answer as to their separate claims and interplead and settle their demands between themselves, the plaintiff being willing, desirous and agreeing to deliver said Bond No. 23 to such of them to whom the said Bond No. 23 shall in the judgment of this Honorable Court appear of right to belong, and plaintiff further offers to deposit the bond with the Clerk of this Court, and that the plaintiff have such other and further relief in the premises as equity may require.

The defendants, J. Weiner and Harry Reisin made their motion to strike the amended complaint for failure to set out a good cause of action.

Thereafter, upon a hearing, the court directed that the amended bill of complaint be stricken and plaintiff having elected to stand on the amended bill, the court dismissed the suit at plaintiff's costs. It is from this order that plaintiff appeals.

By the motion of the defendants to strike the amended bill of complaint they admit all the facts that are properly appearing in the amended bill, and in a discussion of the facts it appears that the defendants admit the plaintiff is the attorney to whom the bond was given by one J. Weiner, who had possession of the same, and who received an receipt therefor signed by the plaintiff, and directed Abe Nelson, as well as the plaintiff, to start such proceedings as would be necessary to enforce collection. By this same motion of the defendants, it is admitted that a foreclosure proceeding was had, and that upon a hearing a decree of foreclosure was instituted, in

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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...and

THE FOLLOWING HAVE BEEN OBTAINED AND PLACED IN THE RECORDS OF THE BUREAU OF INVESTIGATION:

[illegible]

THE DEFENSES

[illegible]

மேலே உள்ளவற்றைப் பற்றி கீழ்க்கண்டவற்றைக் கவனிக்க.

12-11-67

Litt's source. It is from this source that Plaintiff learned
to speak on the amended bill, the source disclosed the bill as being
amended bill as complaint to Plaintiff and Plaintiff having disclosed

of the action of the Government in giving the amended bill
of amendment they want all the time that was formerly invested in
the amended bill, and in a discussion of the issue it appears that
the Government want the bill itself in the way of the new bill
and given by one of them, who has possession of the same, and can
therefore no longer transfer rights by the bill itself, and discuss
the bill, as well as the bill itself, in some such position as
would be necessary to enforce legislation. It is also noted of
the Government, it is identical that a Government Amendment was made,
and that upon a better & better of Government Amendment, in

which the owner of this bond, and several other owners of bonds, sought to enforce their rights by seeking a sale of the property in question. A decree was entered by the court, and this bond was merged in the judgment entered by the court in the foreclosure proceeding.

It is also admitted that at the time this bond was delivered to Nelson, he was a brother-in-law of the defendant Harry Reisin, who also was interested in the proceedings to foreclose.

It is the contention of the plaintiff, according to his amended bill of complaint that he would deliver the bond in question to the owner, who would be entitled to possession of the bond upon a receipt being given to the plaintiff for the bond.

From the complaint it appears that the tender made by the plaintiff to the defendant Harry Reisin was refused in a suit which Reisin instituted in the Municipal Court for the purpose of obtaining judgment from the plaintiff for conversion of the bond. J. Weiner was not a party to the Municipal Court suit, but was made a party by the filing of this bill of complaint, together with Harry Reisin, also Melvin S. Nelson, who has possession of and is looking after the property of Abe Nelson, deceased, although no probate proceeding has been instituted.

From the facts the plaintiff is in possession of the bond in question, the subject of this litigation, and to which adverse claims are made by two or more persons, and it is for the court to take jurisdiction where a disinterested person - the plaintiff here - has possession of property claimed by two or more persons - the defendants - where an action of conversion for the value of the bond is being sought against the plaintiff. The irony of it all is that the plaintiff was desirous of delivering the bond, but, from the facts as alleged in the amended bill of complaint, the defendants refused to accept the bond.

which the owner of this land, and several other owners of lands, sought to enforce their rights by seeking a writ of the property in question. A decree was entered by the court, and this land was merged in the judgment entered by the court in the instant case, proceeding.

It is also admitted that at the time this land was

delivered to him, he was a trustee-in-law of the defendant party, which, who also was interested in the proceedings to determine.

It is the contention of the plaintiff, according to his statement of all of completed that he would deliver the land in question to the owner, who would be entitled to possession of the land upon a receipt being given to him accordingly for the land.

Now the defendant it contends that the owner made up

the plaintiff to the defendant party which was returned in a writ which was delivered in the defendant party for the purpose of obtaining judgment from the plaintiff for possession of the land. It is not a party to the defendant party, but the writ is party to the filing of this bill of complaint, together with party which, also being a party, was has possession of and is located after the issuance of the writ, because, although no judgment proceeding has been entered.

Now the facts the plaintiff is in possession of the land

in question, the subject of this litigation, and he seeks to enforce his rights by law as well as by equity, and it is the court to give satisfaction where a disappointed person - the plaintiff says - the possession of property claimed by him as owner between - the defendant - that an action of possession has the title of the land is being sought against the plaintiff. The issue of it all is that the plaintiff was entitled to deliver the land, but, that the facts as stated in the amended bill of complaint, are defendant refused to accept the land.

We believe the court in this proceeding erred in striking this amended bill of complaint, for the facts fully justified the interpleader proceeding.

The order striking the amended bill of complaint is reversed and the cause is remanded with directions that the defendants be required to answer within such time as the court may deem reasonable.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

DENIS E. SULLIVAN AND WALL, JJ. CONCUR.

IN ORDER TO BE IN A POSITION TO BE ABLE TO
 THIS SHOULD BE OF COURSE, FOR THE FUTURE
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THE ABOVE WORKING THE ABOVE BILL OF COMMERCE IS

REVEREND AND THE ABOVE IS REMOVED WITH ALL THE ABOVE
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33396

SAMUEL SHAPIRO,

(Plaintiff) Appellant,

v.

CHECKER TAXI COMPANY, a corporation,
et al.,

(Defendants) Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

292 I.A. 632²

MR. PRESIDING JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from an order of the court striking plaintiff's declaration upon the ground that it stated no cause of action against the Checker Taxi Company, a corporation, one of the defendants. The action was brought by the plaintiff to recover damages for an alleged assault and battery committed upon the plaintiff by the defendant Sam Green while Green was acting as a servant of the Checker Taxi Company, which the plaintiff claims was within the scope of his employment and in furtherance of the business of the defendant Checker Taxi Company.

The pleadings, which are the subject of this controversy, after alleging in the second count of the amended complaint that the plaintiff seeks to recover from the Checker Taxi Company and Sam Green, also known as Sam Greenberg, one of the defendants, further allege:

"That said defendant, Sam Green, also known as Sam Greenberg, was, at said time and place, employed by Checker Taxi Company, a Corporation, defendant herein, as a servant, in the capacity of a cab starter, and acting in the scope of his authority and engaged upon his master's business and duties, there controlled the movement of traffic and Checker taxicabs there and while so engaged in the conduct and furtherance of the business of said Checker Taxi Company, a corporation, defendant herein, on said date, was stationed and in charge of a cabstand maintained by the defendant Corporation on the premises hereinabove described, to-wit, the Morrison Hotel.

"That among other duties of the said Sam Green, also known as Sam Greenberg, defendant herein, as servant of Checker Taxi Company, a corporation, defendant herein, and while engaged upon his master's business and acting in the scope of his authority as such servant, was that of controlling the

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movement of Checker taxicab traffic at the place hereinabove described, and in the furtherance of the business of the said defendant corporation in controlling said movement of its automobile taxicabs and in keeping the parking facilities in front of the Morrison Hotel open for the parking of vehicles of said defendant Corporation, and while engaged upon the business of the Checker Taxi Company, a Corporation, defendant herein, as such servant, and while acting in the scope of his authority as such servant, * * * did commit the acts alleged.

"That at said time and place, the plaintiff herein, Samuel Shapiro, was in possession and control of an automobile vehicle which he then and there drove up to and parked on the east side of Clark Street where the same is intersected by Madison Street, in front of the said Morrison Hotel, as hereinabove described, and at a point and for a period of time during which he had a legal right so to do, to-wit, for a period of time not exceeding one-half minute; that is to say, sufficient time in which to permit his passenger and guest to enter said automobile vehicle so parked as aforesaid.

"That at said time and place, and while the plaintiff was making an exit from his said vehicle and was about to step to and upon the sidewalk there, the said defendant herein, Sam Green, also known as Sam Greenberg, without any cause or provocation on the part of the plaintiff herein and without any request on the part of the defendant Sam Green * * * that the vehicle of said plaintiff be removed, and without any warning or notice whatever to the plaintiff herein, and while engaged upon the business of the Checker Taxi Company, a corporation, defendant herein, as its servant and while acting within the scope of his authority as such servant, committed the acts of violence herein alleged."

It is further alleged -

"That the defendant Sam Green while acting in the scope of his authority as such servant, at said time and place did heretofore on the 22nd day of May, A. D. 1934, with force and arms, etc., assault plaintiff and did then and there violently seize and lay hold of him * * *."

For the reasons stated by the plaintiff in his third amended complaint, he seeks to recover damages alleged to have been sustained by reason of the assault made upon him.

Upon consideration, the court granted the motion of the Checker Taxi Company to dismiss plaintiff's third amended complaint, and entered judgment for the defendant, from which judgment plaintiff appeals.

The question here is whether the master under the allegations contained in the declaration is liable for the acts of its servant done in obedience to the master's order or within the scope of his employment or line of duty, but not otherwise.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is a legitimate organization or a subversive one.

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1. The first step in the process of identifying a problem is to define the problem. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the underlying causes. Once the causes have been identified, the next step is to develop a plan of action. This involves identifying the steps that need to be taken to solve the problem and determining the resources that will be needed to implement the plan. Once a plan of action has been developed, the next step is to implement the plan. This involves carrying out the steps that have been identified in the plan and monitoring the progress of the implementation. Finally, the last step in the process is to evaluate the results of the implementation. This involves determining whether the problem has been solved and whether the resources have been used effectively.

and he is not a very good one, either.

THREATS THAT COME FROM THE UNITED STATES ARE THE MOST DANGEROUS TO THE
COUNTRY. THE UNITED STATES IS THE MOST DANGEROUS COUNTRY IN THE WORLD.

The Division does not consider the subject matter of this communication to be of such a nature as to require the attention of the Bureau. It is suggested that the Bureau be kept advised of any further developments in this matter.

The defendant contends there is no question whatsoever that had the plaintiff alleged that it being the duty of the defendant's employee to keep the space in front of the Morrison Hotel free for its taxicabs and in furtherance of such duty the defendant requested plaintiff, Samuel Shapiro, to remove his automobile from such space, and that the having refused to do so, the defendant Sam Green thereupon assaulted him, the plaintiff would thereby have stated sufficient facts to entitle him to aver the legal conclusion that he, Sam Green, was acting within the scope of his authority and in furtherance of defendant's business.

The defendant's further contention is that the third amended complaint contains no allegation of fact from which it appears that the plaintiff was assaulted by the defendant Sam Green, as an agent of and within the scope of his employment at the time of the assault.

By the motion to strike the third amended complaint, the Checker Taxi Company admits all facts that are well pleaded, and therefore admits that the defendant Sam Green, also known as Sam Greenberg, was employed by the Checker Taxi Company in the capacity of a taxicab starter and thereby controlled the movement of Checker taxicab traffic, and that he was stationed at and in charge of a cabstand maintained by the defendant corporation at the Morrison Hotel, and in furtherance of the business of this defendant corporation it was his duty to keep the parking facilities in front of the Morrison Hotel open for the parking of vehicles of the defendant corporation, and that while engaged in this business of the Checker Taxi Company as such servant did commit the acts alleged.

It further appears from the pleadings that while the plaintiff was making an exit from his vehicle and was about to step upon the sidewalk at the time and place to permit his passenger and guest to enter his parked automobile, the defendant Sam Green, without any cause or provocation, and without any warning or notice to the plain-

tiff that the vehicle of the plaintiff be removed from the cabstand at the Morrison Hotel, assaulted and committed the acts of violence alleged.

Taking into consideration these facts which are admitted, the rule provided by Ch. 110 Par. 157, Sec. 33, Ill. Rev. Stats. 1937, that pleadings shall be liberally construed with a view to doing substantial justice between the parties, is applicable. It therefore follows that it is for the court to determine whether the allegation is sufficient to sustain a judgment for the plaintiff.

There is no question that the co-defendant Sam Green was employed by the Checker Taxi Company to control traffic and the movement of cabs at the station at the Morrison Hotel, and it was the undoubted right of the plaintiff to use this part of the street for the purpose of taking on passengers, as alleged in the pleadings. The plaintiff's automobile was parked and he was in the act of taking on a passenger and guest when he was assaulted by the agent of the Checker Taxi Company. While it is true as alleged that the Checker Taxi Company maintained a taxicab station at the place in question, still it did not have the exclusive right to receive passengers for taxi companies at the time in question, and the fact appears from the pleadings that the Checker Taxi Company directed its agent there to control the traffic and thereby keep the parking space open for the movement of the taxicabs of the defendant corporation. This agent Green, when plaintiff's cab stopped in the parking space to take on a passenger, assaulted him, as alleged in the declaration, and it would seem to us from the motion made to strike that these facts were admitted, and in trying to keep this taxicab stand clear of automobiles he assaulted the plaintiff because he stopped in the parking space and interfered with this agent in his effort to keep this place clear for the defendant's taxicabs.

with these the records of the plaintiff be removed from the evidence at the Madison Hotel, examined and corrected the acts of plaintiff alleged.

Taking into consideration these facts which are admitted, the rule provided by St. 110 Nov. 1st, 1907, Nov. 11th, 1907, that plaintiff shall be liberally examined with a view to being substantiated justifies between the parties, as applicable. It therefore follows that it is for the court to determine whether the plaintiff is entitled to submit a judgment for the plaintiff. There is no question that the no-argument was given was

employed by the defendant taxi company to control traffic and the movement of cars at the station at the Madison Hotel, and it was the undoubted right of the plaintiff to use this part of the street for the purpose of taking an assignment, as alleged in the complaint. The plaintiff's automobile was parked and he was in the act of taking on a passenger and when he was stopped by the agent of the defendant taxi company. While it is true as alleged that the defendant taxi company maintained a parking station at the place in question, still it had not made the exclusive right to receive passengers for taxi companies at the time in question, and the fact appears from the evidence that the defendant taxi company allowed the agent to stop to control the traffic and thereby keep the parking space open for movement of the taxicabs of the defendant corporation. This agent, when plaintiff's car stopped in the parking space to take on a passenger, obstructed him, as alleged in the complaint, and it would seem to us from the entire case to believe that these facts were admitted, and in trying to keep this complaint from being admitted he committed the plaintiff because he showed in the parking space and interfered with him in his effort to take this place over for the defendant's business.

We believe, upon due consideration of all the facts, that it is not necessary to consider the questions raised as to the sufficiency of the declaration to charge an employer with the acts of its agent, other than that the allegations contained in the third amended complaint are sufficient to maintain an action.

The order of the trial court sustaining the motion to strike is reversed and the cause remanded with directions that the defendant answer the third amended complaint within such time as may be fixed by the court.

ORDER REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

39435

THE PEOPLE OF THE STATE OF ILLINOIS,

(Plaintiff) Appellant,

v.

LOUIS HUNT,

(Defendant) Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

292 I.A. 632³

MR. PRESIDING JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

The defendant, Louis Hunt, seeks to have reviewed the judgment of the Municipal Court of Chicago entered on the 18th day of December, 1936.

The record is what is termed the common law record, no report of the proceedings having been filed which would have contained the evidence of witnesses heard by the court at the time of the trial of the cause.

The defendant was tried on an information alleging that he, Louis Hunt, on the 1st day of August, 1936, being armed with a certain loaded pistol commonly called a revolver, same being a dangerous and deadly weapon, etc., made an assault in and upon Will Johnson, contrary to statute, etc. The defendant was found guilty and the court imposed sentence and committed the defendant to the House of Correction for one year and a fine of \$25 and costs.

After the defendant had been committed to the House of Correction and had served 4 1/2 months of the year's sentence, notice was served upon the People of the State of Illinois, represented by the State's Attorney, of a petition in the nature of a writ of error coram nobis on December 8, 1936. The petition alleged that the complaining witness and others conspired together to obtain from the petitioner his money by drawing him into an argument as an excuse for them to assault him and take his money, and that the petitioner was armed and ward off the assault. The petition further alleged that

petitioner was not represented by counsel, and that petitioner was found guilty of a crime not specifically denounced by the criminal law.

The People of the State of Illinois, by the State's Attorney of Cook County, filed a motion to dismiss defendant's petition for the reason that the petition did not state facts, but mere conclusions; that the alleged facts were known to defendant at the time of the trial, and that he was not prevented from presenting the alleged facts either through fraud, duress, excusable mistake or ignorance; that he was not prevented from employing counsel, and that, if counsel had been requested, the court would have appointed counsel for him, and that the facts stated were insufficient to give the court jurisdiction.

From the record it appears that the People's motion to dismiss this petition was overruled on December 11, 1936, and the court continued the hearing to December 18, 1936. The State's Attorney made a motion to vacate and expunge the order of December 11, 1936, on the ground that the court was without jurisdiction to enter the motion to dismiss. This motion was also overruled by the court.

Thereupon the State's Attorney filed an answer to the petition of the defendant on December 17, 1936, and it appears from the record that on December 18, 1936, there was a "Full hearing on petition. New trial granted, defendant discharged. No objection."

Thereafter, the People served notice on the defendant that it would present a motion for a new trial, with affidavit attached, on the 31st day of December, 1936, stating that the court had set the hearing on the petition of the defendant for twelve noon on December 18, 1936; that the State's Attorney was present in court at noon on said date and learned that said hearing had already been completed and the defendant in the criminal action discharged before the hour set by the court for hearing.

To this motion the defendant's attorney filed an affidavit on December 22, 1936, to the effect that the hearing on defendant's petition was set for 9:30 a. m. December 18, 1936, and on December 22, 1936, the State's Attorney's motion for a new trial and in arrest of judgment was overruled. The court, however, upon objection, expunged the words, "No objection" from the order entered on December 18, 1936, by which order the defendant was discharged. The motion of the defendant was allowed by virtue of Section 73, Chapter 110, Smith-Hurd's Ill. Rev. Stats. 1935, substituted for the common law writ of error coram nobis, the purpose of which writ being to relieve against errors committed in entering a judgment against a deceased person; an infant without a guardian, a feme covert , a person insane at the time of the trial, or that a valid defense existed in the facts, which without negligence of the defendant, were not presented to the court either through fraud, duress or excusable mistake. The facts not appearing on the face of the record, no error of fact appears such as if known would have prevented entry of the judgment by the court. The facts upon which the petition is presented must be stated in the petition and not upon conclusions of the pleader.

It appears from the petition filed by the defendant on December 9, 1936, that he alleges Will Johnson, together with others, knowing that petitioner had just received the soldiers bonus, conspired to obtain the same from him by force and against his will; and in furtherance of the conspiracy it was arranged to draw the petitioner into an argument as an excuse for an assault upon his person, thereby enabling the said conspirators to abstract his money; that the petitioner was armed and successfully warded off the assault.

The statement of these facts in the petition would indicate that they were all known to the defendant at the time the cause was heard by the court, and he should have presented such facts to the court. So far as we are able to learn from this record these facts

In this motion the defendant's attorney filed an affidavit
on December 12, 1935, to the effect that the parties on defendant's
petition was set for 1:30 p. m. December 18, 1935, and on December
12, 1935, the state's attorney's motion for a new trial was in effect
of judgment was overruled. The court, however, upon objection,
expressed the words, "the objection" from the other witness on December
12, 1935, by which order the defendant was discharged. The motion
of the defendant was allowed by virtue of motion 17, Exhibit 110,
Smith-Howard's 111. N.Y. 1935, 1935, 1935, 1935, 1935, 1935, 1935,
with all other relevant facts. The purpose of which was being to relieve
against every admitted in existing a judgment against a defendant
person; no intent without a question, a fact question, a fact question,
of the time of the trial, or that a valid defense existed in the
fact, which without admission of the defendant, was not presented
to the court without through fact, threat or economic attack. The
fact not appearing on the face of the record, no state of fact
appears such as it would have prevented entry of the judgment of
the court. The facts upon which the petition is presented was the
stated in the petition and not upon consideration of the district.
It appears from the petition filed by the defendant on
December 9, 1935, that he alleges that Johnson, together with others,
knowing that defendant had just received the entire money,
conspired to obtain the same from him by force and against his will;
and in furtherance of the conspiracy it was arranged in New York
petition into an agreement as to terms for an amount upon his return
thereby violating the said conspiracy as against all money that
the defendant was and was unlawfully taking off the district.
The statement of these facts in the petition which includes
that they were all known to the defendant at the time the same was
made by the court, and he should have presented such facts to the
court. He has an idea as to how this record was made

may have been presented to the court at the time of the trial, and if so, the court had knowledge and was fully justified in entering the judgment that was entered in this cause.

The defendant makes much of the fact that he was without an attorney to aid him and appear for him in the trial of the case. While it is true that the defendant is entitled to an attorney to appear for him at the trial, still he also has the right to waive the right and take such part in the trial as he may deem necessary. There is nothing in this case which would advise this court that demand was made for the appointment of an attorney for the defendant. We have the right to assume that the court at the time of the trial protected the interest of the defendant, and the charge is not made that the presiding judge refused to appoint an attorney for the defendant.

In the case of The People v. Parcora, 358 Ill. 448, the court said:

"The court in the trial of criminal cases is bound to see that counsel is provided, when requested, for defendants unable to procure such assistance. It is a matter of common knowledge that in a court such as the Municipal Court of Chicago hundreds of cases are heard without the intervention of counsel. In the absence of a sufficient showing to the contrary, this court must presume that the judge hearing this case in the municipal court did not deny a request for the services of counsel. There is here no sufficient showing of matters of fact not within the knowledge of the trial court which would constitute ground for the application of the rule governing a petition in the nature of writ of error coram nobis. It is not sought by this writ of error to review the original judgment, but review is sought of the refusal of the court to vacate that judgment under what is styled as a petition for writ of error coram nobis."

From an examination of the record now before us it would seem that the purpose of this proceeding was to seek a further review of the case after judgment was entered and the defendant was committed to the House of Correction and had begun serving the term of his sentence. There is nothing in the instant case which would indicate that any fact was suppressed which would have established defendant's innocence, or which would have prevented the court from entering judg-

may have been presented in the course of the trial, and it
is, the court has decided, and the court has decided in
judgment that was decided in this court.
The defendant asked that the court should be so advised
as to the right to call and examine the witness in the trial of the case.
While it is true that the defendant is entitled to an opportunity to
examine the witness in the trial, still he also has the right to cross-examine
the witness and this right is in the trial as he has the opportunity. There
is nothing in this case which would advise this court that the defendant
made for the appointment of an attorney for the defendant. He has
the right to retain counsel and the right of the trial court to
the interest of the defendant, and the court is not aware that the
court judge refused to appoint an attorney for the defendant.
In the case of THE PEOPLE v. ROBERTA, 222 Ill. 445, 222

the court in the trial of criminal cases is bound to see
that counsel is retained, when requested, for witnesses who
to produce such evidence. It is a matter of common knowledge
that in a court such as the court of Illinois, the
of cases are heard without the intervention of counsel. In the
presence of a witness who is in the court, the court may
proceed that the witness has been examined, and the court may
and not only a witness for the purpose of counsel. There is
no such evidence as to the court of Illinois at that time and
knowledge of the trial court which would constitute ground for
the application of the rule governing a witness in the court
of trial of criminal cases. It is not enough to say that
order to review the trial judgment, but review is made by
the review of the court in which the judgment was made and
upheld as a witness for trial of criminal cases.

There is nothing in the record and nothing in it which
shows that the purpose of the court was to make a further review
of the case after judgment was entered and the defendant was sentenced
in the house of correction and had been serving the term of his
sentence. There is nothing in the record which would advise this
court that any such suggestion would give rise to a further review
in which would have intervened the state then existing law.

ment had he known of such fact.

For the reasons stated in this opinion, the judgment entered by the court on December 18, 1936, discharging the defendant, is reversed and the cause is remanded to the Municipal Court of Chicago to set aside the order and the defendant remanded to the House of Correction to serve the remainder of his sentence, as provided by law.

REVERSED AND REMANDED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

was not be known of your fact.

For the reasons stated in this opinion, the judgment

entered by the court on December 11, 1933, is hereby affirmed.

It is ordered that the writ be dissolved and the plaintiff

be restored to his former position and the costs awarded by the

court of appeals be paid by the plaintiff.

Given at New York, New York, this 11th day of June, 1934.

ROBERT H. JACKSON, Chief Justice.

JOHN S. QUINN and WILLIAM J. QUINN.

39476

PEOPLE OF THE STATE OF ILLINOIS,

(Plaintiff) Defendant in Error,

v.

JOHN PELTZ,

(Defendant) Plaintiff in Error,

WRIT OF ERROR

MUNICIPAL COURT

OF CHICAGO.

292 I.A. 632^u

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE
THE COURT.

The defendant in this proceeding seeks by writ of error to review the judgment entered by the court in the above entitled cause.

The defendant, John Peltz, was arrested on January 7, 1937. He was charged with the crime alleged in the amended information filed on January 29, 1937, that is, that the defendant on January 1, 1937, unlawfully, intentionally and maliciously, without authority from the owner, damaged a motor vehicle by breaking an ignition lock on the dash board of the motor vehicle, in violation of Paragraph 439, Chapter 38, Smith-Hurd Rev. Stats. 1935.

The complaining witness in this case testified that on New Year's Day, January 1, 1937, at about 8:00 o'clock P.M. he parked his Dodge sedan at 2749 East 26th Street, Chicago, Illinois, where he visited some friends; that upon returning to his car he found the defendant asleep at the wheel in an intoxicated condition; that he aroused the defendant and ordered him from his car; that without offering any resistance the defendant got out of the car, and after remaining in the vicinity for some time defendant departed. That after the defendant left, witness tried to open the ignition lock but could not insert his key. The car was not otherwise injured, the doors and windows had not been broken.

The testimony of this defendant is to the effect that he had been drinking at a tavern all evening from about 5:00 o'clock; that he was on his way home when he passed the place where the automobile in question was parked and saw two boys enter it; that the car was of the

same make as an automobile owned by his family; and that upon seeing the two boys get into the car he ordered them away; that he does not remember what happened thereafter until he was awakened by the complaining witness; that he had no keys whatever on his person; that he did not break the lock or tamper with it; that he had no intention of stealing the automobile.

It further appears that the defendant is employed at the Carnegie Steel Company.

At the close of the state's case, counsel for the defendant moved that the defendant be discharged. The court questioned the complaining witness, and over the objection of the defendant, asked the witness if any one had talked to him about the case since he made the complaint to the police department. The complaining witness answered that the father of the defendant had come to him and made inquiry concerning the damage to the car and paid \$7.00 for repairing the ignition lock. Defendant's counsel moved that this testimony be stricken, but the court overruled the motion and reprimanded the complaining witness for accepting the money.

The point is made by the defendant that all this procedure was erroneous in that there is nothing in the evidence which would tend to connect this defendant with the payment of the amount of damages sustained by the complaining witness. Graham, et al. v. The People, 115 Ill. 588.

We have carefully considered this case and believe that it was erroneous for the court to receive evidence unless the defendant was connected with the offer whereby the complaining witness had been paid \$7.00 for the amount of damages alleged to have been done to the automobile by the defendant. The record shows that he objected. Notwithstanding this, the evidence was admitted and the court continued the case for the purpose of further investigation. The record does not show, as far as we can determine, that there was an

...and that upon
seeing the two boys and into the car he walked back; that he
does not remember that defendant thereafter until he was arrested
by the complaining witness; that he had no tape measure on his
person; that he did not have the lock in pocket at that time; that he had
no intention of stealing the automobile.

It further appears that the defendant is employed as the
driver of a taxi cab.

At the time of the events here, according to the testimony
given, that the defendant was employed as a taxi driver. The only person
remaining alive, and over the objection of the defendant, called
the witness. It was not called in his time for him to be called
the complaint to the police department. The complaining witness
admitted that the father of the defendant had come to him and was
highly commending the money in the car and told him to be careful
and hidden look. Defendant's counsel moved this testimony be
stricken, but the court refused the motion and ruled that the
complaining witness was carrying the money.

The point is made by the defendant that all this testimony
and evidence is that there is nothing in the evidence which would
tend to connect him with the payment of the money at
any time suggested by the complaining witness. People v. D.
The People, vs. D.

...we have carefully examined this case and believe that it
has evidence for the court in reaching a verdict unless the defendant
has presented all the facts known to the complaining witness and
that all \$5.00 for the money of the defendant is now gone from
the defendant by the defendant. The court must be satisfied
that the witness was truthful and that the facts were
stated in the case for the purpose of the investigation. The court
does not agree, as it can be seen from the testimony, that there was no

intention on the part of this defendant to commit larceny. The only evidence is as to whether or not he tampered with the lock of the car.

We think it better under all the circumstances that there be a retrial. We are of the opinion that the facts do not establish beyond a reasonable doubt that the defendant is guilty of the crime charged.

REVERSED AND REMANDED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

39179

SOPHIE LABANOWSKI,

Appellee,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

292 I.A. 632⁵

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks the reversal of a judgment against it and in favor of plaintiff, as beneficiary, under a group insurance policy No. 2893-G, issued by the defendant on January 11, 1930, to Emily Labanowski, deceased, while the insured was in the employ of Armour & Company. The judgment was entered upon the verdict of a jury. The policy provides for the payment of certain premiums, at least 25% of which were to be paid by her employer, Armour & Company, and that in case of the death of Emily Labanowski, while in the employ of Armour & Company, and while the policy was in force, the insurance company would pay to the beneficiary the sum of \$750.00. Also, the policy contains the following provision:

"Total and permanent disability benefits. Upon receipt, at its home office in the City of New York, of due proof that any employee, while insured hereunder, and prior to his sixtieth birthday, has become totally and permanently disabled, as the result of bodily injury or disease, so as to be prevented thereby from engaging in any occupation and performing any work for compensation or profit, the Company will waive the payment of further premiums as to such employee and six months after receipt of such proof, will commence to pay, in lieu of the payment of insurance at his death, monthly installments as defined below to the said employee or to a person designated by him for the purpose, or, if such disability is due to, or is accompanied by, mental incapacity, to the beneficiary of record of the said employee, and will continue such payments for the period provided below, should the insured continue totally and permanently disabled."

Also, that "On approval of claim on account of such disability, the insurance in force on the life of said employee under this policy,

shall be cancelled as of the date of receipt of due proof of disability." A further provision in the policy as to payments for permanent disability is that in lieu of the amount of \$750.00 to be paid to the beneficiary in case of the death of the insured, and in case of her total and permanent disability occurring while in such employ, the company would pay the employee fifteen monthly installments of \$50.69 each, and that in case of the death of the employee during the period of total and permanent disability, any installments remaining unpaid should be commuted and paid to the designated beneficiary.

The application upon which policy No. 2893-G was issued, and upon which this action is predicated, is as follows:

"Emily Labanowski
 2893 G. Application For Insurance 41148
 Branch Chicago Department Eli. Bas. Location U. S. Yards
 Plant Conference Board of Armour & Company
 Name of Employee Labanowski, Emily, Working No. 51141
 Occupation Labor Continuously Employed Since 7-8-29
 Married or Single S Sex F Color W Date of Birth
 5-14-10 Age 19
 Beneficiary, Labanowski, Relationship Mother.
 Class B
 \$750.00 Life Insurance
 \$7.50 Weekly Health
 (Date Signed) Jul 8, 1929
 Insurance Effective Jan. 11, 1930
 (Signed) Emily Labanowski"

In addition to the policy mentioned, and on January 11, 1930, there was also issued by the defendant company to Emily Labanowski, a certificate designated as "Group Health Policy No. 860-GH", which provides for the payment of \$7.50 a week to the insured, Emily Labanowski, in case she became "wholly and continuously disabled and prevented from performing any and every duty of her occupation by sickness contracted or injury sustained." The insured's employment by Armour & Company ceased on February 9, 1934. No premiums were paid by the insured after May 18, 1934. However, under the sections of the policy quoted above, this did not forfeit her right to recover if proper proof was given to the defendant of the fact of her permanent disability.

The insured died on September 30, 1934, as a result of a skull fracture received in an automobile accident, and her death was not in any way the result of or connected with her employment or illness. This action is brought by the plaintiff, as beneficiary, to recover ~~the~~ various amounts alleged to ^{have been} ~~due~~ to the insured, based upon the theory that during the time she was insured thereunder and prior to her sixtieth birthday, she became totally and permanently disabled, and that the various installments for such permanent disability were due and payable to her, and to her mother, as beneficiary, after her death. Plaintiff does not contend that any claim of total disability was furnished defendant during the lifetime of the insured and after she ceased to be employed by Armour & Company, other than that periodically and beginning with March 9, 1934, reports were made as to the insured person's condition by her attending physician. These reports are alleged to have been made under the health policy "No. 860-GH", and are as follows:

"Metropolitan Life Insurance Company

(Incorporated by this State of New York)

Supplementary report of attending physician

Name of Patient: Miss Emily Labanowski

Address: 5330 S. Justine St.

Employed by Armour & Co.

First treated on Nov. 1933 by Doctor W. H. Kenner.

Are you treating patient now? Yes

Was she totally disabled during this time? All but a few days.

If not, when did disability cease? Still disabled.

If still disabled, is she confined to house? Yes

Please give a clear and concise statement of her present physical condition and present cause of disability: Present condition is improved, pelvic cellulitis, chr. endometritis.

When do you think patient will be able to work? About April 1.

Date: Mar. 9, 1934. Signature W. H. Kenner, M. D."

"Metropolitan Life Insurance Company

(Incorporated by the State of New York)

Supplementary Report of Attending Physician

Name of Patient: Emily Labanowski

Address: 5330 S. Justine

Employed by Armour & Co.

First treated on Nov. 1933 by Doctor W. H. Kenner.

Are you treating patient now? Yes

Was she totally disabled during this time? Yes

If still disabled, is she confined to house? Yes

If not, why is she unable to work? Due to illness

Please give a clear and concise statement of her present physical condition and present cause of disability: Condition

fair, pelvic cellulitis, adhesions and surgical operation
When do you think patient will be able to work? April latter
part.

Date: March 23. Signature W. H. Kenner, M. D."

Metropolitan Life Insurance Company

(Incorporated by this State of New York)

Supplementary Report of Attending Physician

Name of Patient: Emily Labanowski

Address: 5330 S. Justine

Employed by Armour & Co.

First treated on Nov. 1933 by Doctor W. H. Kenner.

Are you treating patient now? Yes

Was she totally disabled during this time? Yes

If not, when did disability cease? Present

If still disabled, is she confined to house? Yes

If not, why is she unable to work? Due to operation

Please give a clear and concise statement of her present
physical condition and present cause of disability. Improving,
operation for pelvic cellulitis.

When do you think patient will be able to work? Can't say.

April 17 Signature W. H. Kenner, M. D."

Metropolitan Life Insurance Company

(Incorporated by this State of New York)

Supplementary Report of Attending Physician

Name of Patient: Emily Labanowski

Address: 5330 S. Justine

Employed by Armour & Co.

First treated on Nov. 1933 by Doctor Kenner

Are you treating patient now? Yes

Was she totally disabled during this time? Yes

If not, when did disability cease? Present

If still disabled, is she confined to house? Yes

If not, why is she unable to work? Due to operation.

Please give a clear and concise statement of her present
physical condition and present cause of disability. Patient
is improving but due to operation patient should not return
to work for a while.

When do you think patient will be able to work? Can't say.

Date: May 18, 1934 Signature W. H. Kenner, M. D."

"Notice to Physician: This form to be completed by the physician
actually in attendance on account of injury or sickness.

Certificate of Attending Physician

1. Full name of patient: Emily Labanowski

2. On what date were you first consulted by claimant on
account of this injury or sickness? Feb. 1934.

3. On what date did you last give actual and necessary
treatment? Sep. 5, 1934.

4. How many treatments have you given claimant during this
period? (a) Number of visits to claimant's home. None
(b) Number of treatments at office. Weekly

5. State precise nature of injury or sickness which caused the
disability. Pelvic Cellulitis and Salpingitis.

6. Has claimant been confined to bed? How long? From Feb.
1934 to May 1934.

7. Has claimant been confined to house? How Long? From April
1934 to August 1934.

These points are discussed in the following sections of the report. It is hoped that the reader will find this report of interest.

Section 1. Introduction. This section discusses the general nature of the problem and the objectives of the study.

Section 2. Literature Review. This section reviews the existing literature on the subject and identifies the gaps in knowledge.

Section 3. Methodology. This section describes the methods used in the study, including the data collection and analysis techniques.

Section 4. Results. This section presents the findings of the study, including the data and the statistical analysis.

Section 5. Discussion. This section discusses the implications of the findings and the limitations of the study.

Section 6. Conclusion. This section summarizes the main findings of the study and provides recommendations for future research.

Section 7. References. This section lists the references used in the study.

Section 8. Appendix. This section contains the supplementary material, including the raw data and the detailed calculations.

Section 9. Glossary. This section defines the key terms used in the report.

Section 10. Acknowledgments. This section acknowledges the contributions of the individuals and organizations that assisted in the study.

Section 11. Biographical Note. This section provides a brief biography of the author.

Section 12. Index. This section provides an index of the report, listing the page numbers for each section.

Section 13. Summary. This section provides a brief summary of the report.

Section 14. Abstract. This section provides a brief abstract of the report.

Section 15. Introduction. This section discusses the general nature of the problem and the objectives of the study.

Section 16. Literature Review. This section reviews the existing literature on the subject and identifies the gaps in knowledge.

Section 17. Methodology. This section describes the methods used in the study, including the data collection and analysis techniques.

Section 18. Results. This section presents the findings of the study, including the data and the statistical analysis.

Section 19. Discussion. This section discusses the implications of the findings and the limitations of the study.

Section 20. Conclusion. This section summarizes the main findings of the study and provides recommendations for future research.

Section 21. References. This section lists the references used in the study.

Section 22. Appendix. This section contains the supplementary material, including the raw data and the detailed calculations.

Section 23. Glossary. This section defines the key terms used in the report.

Section 24. Acknowledgments. This section acknowledges the contributions of the individuals and organizations that assisted in the study.

Section 25. Biographical Note. This section provides a brief biography of the author.

Section 26. Index. This section provides an index of the report, listing the page numbers for each section.

Section 27. Summary. This section provides a brief summary of the report.

Section 28. Abstract. This section provides a brief abstract of the report.

8. Has claimant been totally disabled solely by this injury or sickness so that he was physically unable to work? How long? From Feb. 1934 to present 1934.
 9. If not confined to house, why was claimant unable to resume work in whole or part? Was not physically able due to previous illness.
 10. Why can claimant not be treated for this condition while continuing at work? Work aggravates condition.
 11. (a) Is claimant totally disabled at this time? Deceased.
- Signed W. M. Kenner, M. D. Attending Physician, Graduate of Loyola Univ. Med. Dept. Year Graduated 1925, Date Oct. 8, 1934."

This last report was made after the death of the insured.

The testimony of Isabel Labanowski, a daughter of the plaintiff and sister of the insured, is to the effect that on February 9, 1934, the insured ceased working for Armour & Company; that on that date she returned from work to her home, and that when she arrived at home, she was pale and trembling and had chills, and was very weak; that after that time, she was home in bed, and that she went to see a Dr. Kenner, who testified in the trial of the case, that thereafter the insured went to a hospital on February 16, 1934, where she was under the care of a Dr. Kenner; that she, the insured, was in the hospital about ten days; that she left the hospital about February 26, 1934, and that she was confined to bed "practically most of the time;" that she was weak and that she gained no weight, and that her appetite was poor; that she was married on March 10, 1934, and lived at home; that she inspected garments, and that she worked for several days in the latter part of July; that after she was married she moved to another address, and that the witness kept house for her, and that during that time she was pale and weak. The witness testified that she attended the wedding of her sister at the church and at the services.

The testimony of the plaintiff, mother of Emily Labanowski, the insured, is to the effect that the insured was 23 years of age at the time of her death; that on February 9, 1934, when the insured ceased working, she came home from work and was sick and pale and had pains; that she was taken to a hospital, and that after she left the hospital, she lived with the witness; that the insured did no work at

home, and was in bed a portion of the time, and that thereafter she was married and left the home of her mother.

The testimony as to the condition of the insured prior to her death, including that of her attending physician, Dr. Kenner, and the reports made by him, tend to prove that during the period mentioned, she was then totally disabled. However, under the terms of the policy, defendant should have had notice of this fact, and that the condition was permanent, if true. While the record shows that upon the report of this physician, thirteen payments of \$7.50 each, making a total of \$97.50, was paid to the insured, which the insured receipted for as "temporary disability benefits," and which defendant contends were made upon the theory that she was but temporarily incapacitated, it is nevertheless our opinion that the question as to whether or not these reports to defendant were notice to it that, as a matter of fact, insured was totally and permanently disabled, was a question for the jury to consider and determine from the evidence before it.

Defendant insists that this proof of permanent disability must be made to the satisfaction of the insurance company. In Sargent v. Prudential Insurance Co. of America, 283 Ill. App. 640, (Abstract Opinion), this court said:

"The argument of the defendant assumes that plaintiff's application for benefits must contain proofs to the satisfaction of the insurance company that he was permanently disabled, whereas, it is more reasonable to hold that the fact of disability itself is the determining factor rather than the quality of the proof contained in the application." (Italics ours).

We believe this to be a correct statement of the law applicable to the instant case.

Defendant objects to the following instructions, and insists that the court was in error in submitting them to the jury:

"The court instructs the jury that the provision in the group policy of defendant insurance company requiring proof of

...and was in one position of law firm, and that thereafter was
was moving and left the firm of one partner.

The testimony as to the location of the law firm is
not clear, including that of the attorney, including, of course,
and the reports made by him, and of those who during the period
concerned, and who then finally dissolved. However, under the terms
of the policy, defendant should have had notice of this fact, and
that the condition was changed, if true. While the record shows
that upon the report of this witness, further requests of \$10.00
were made, making a total of \$20.00, and also to the amount, which the
insured provided for a "constructive discharge" and which
defendant witnesses have made upon the theory that now and then
currently investigated, it is nevertheless not within that the
question is as to whether or not these reports to defendant were made
to it then, as a matter of fact, having been finally and conclusively
disputed, and a question for the jury to consider and determine
from the evidence before it.

Defendant insists that this check of defendant's liability
must be made to the satisfaction of the insurance company. In United
v. Federal Insurance Co. of America, 202 Ill. App. 2d, 100 (1955)
Opinion, this court said:

"The question at the defendant's request is whether the
application for benefits was made to the satisfaction of the insurance
company and not to the satisfaction of the insurance company. It is
not necessary to say that the law is clear that the
policy is the controlling factor in the matter. (Illinois cases.)
of the facts involved in the construction."

It is not to be a correct statement of the law applicable in
the instant case.

Defendant objects to the following instructions, and insists
that the court was in error in submitting them to the jury:

"The court instructs the jury that the provision in the
cross-policy of defendant insurance company regarding duty of

the total disability of the insured to be given to the defendant company at its home office in New York, provided such person was under the age of sixty years, is a provision for the sole benefit of the company and may be waived by the insurance company. And if you find from the evidence in this case that the defendant company having had full previous knowledge that it had not received due notice and proof as required by its policy of the total and permanent disability of the insured, recognized and treated the policy as still in force by its acts and course of dealing with the insured, the employer, the beneficiary or the duly authorized agents of either, then the defendant company is estopped to set up a provision as a defense and will thereby be deemed to have waived it."

"The court instructs the jury that the policy requirement in this case that in the event of the total and permanent disability of the insured so that she could not perform any work or engage in any occupation for compensation or profit, that insured should furnish due proof of such disability to the New York office of the defendant, providing she be less than sixty years old, does not say what is considered to be due proof and that the law is in such case that due proof would be such proof as would be satisfactory to reasonable men, acting reasonably. If you believe from the evidence that the defendant company, through its duly authorized agents, received such notice of the insured's total and permanent disability as above described as would be sufficient as to reasonable men, acting reasonably, then you should find that the insured and the plaintiff furnished due proof of said disability as required by the policy."

The first instruction is so confusing that we have been unable to arrive at its meaning. It seems, however, to proceed upon the theory that defendant by its conduct, had waived the notice of permanent disability of the insured, and that defendant was estopped to set up the defense that it had received no such notice. There is nothing in the record to justify these conclusions.

Defendant also insists that the plaintiff here is not named as beneficiary in the policy. An examination of the application for insurance leads us to conclude that it is clearly indicated that plaintiff should be the beneficiary.

In view of our holding, that whether or not the notices to defendant of the insured's disability were sufficient to apprise it that the insured's ailment produced total and permanent disability, was a question of fact for the jury to determine, the jury should

have been properly instructed on this question. The two instructions quoted are difficult to understand, are contradictory, misleading and irreconcilable. We are constrained to hold that the court was guilty of error in giving them, and that, therefore, defendant did not have a fair trial. The cause is reversed and remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

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have been promptly answered in each instance. The two questions
 seemed the difficulty of understanding, the construction, and
 and irreconcilable. In an instance in which the court was
 policy of view in light of the, and that, however, because his
 not have a fair trial. The court is required and required for a
 case trial.

REVENUE AND REVENUE FOR A NEW TRIAL.

REVENUE, V. L. THE REVENUE & REVENUE, X. CORP.

39222

P.E.B. FRAY,

Appellant,

v.

E. J. HALE,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

292 I.A. 633¹

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks the reversal of a judgment entered against him in the Superior Court of Cook County for costs in an action brought by plaintiff against defendant to recover for severe damages alleged to have been suffered by plaintiff through the alleged negligence of the defendant in the operation of a Buick automobile, owned and driven by the defendant. The accident out of which the suit arose, occurred on May 12, 1933, near the southeast corner of 51st & State streets, in the city of Chicago. The trial was by jury, which returned a verdict in favor of the defendant.

Plaintiff testified to the effect that on May 12, 1933, he became a passenger on a street car going north on State street, in the city of Chicago; that the street car on which plaintiff was a passenger, came to a stop on the south side of 51st street, and that then the front of the street car had not proceeded beyond the building line on the south side of 51st street; that after the street car had stopped, plaintiff stepped off the front end of the car and "stood there", neither making a move backward or forward; that at that time, he was standing about 18 to 20 inches east of the east rail of the northbound street car tracks; that suddenly he was knocked unconscious, and that he afterward regained consciousness in the Provident Hospital. On cross-examination, plaintiff testified, in substance, that the accident happened at about 5 o'clock in the afternoon; that after he

AP

1. The defendant is a person of good character and reputation in the community, and is not a habitual offender.

got off the street car, he stood still for approximately five or six seconds; that he then saw a truck coming at a distance of approximately 75 feet from him, that the truck was not in the car track, and that it turned east when it came within 25 feet of the crossing; that he saw the Buick car when it was about 50 feet beyond the truck,

Roscoe Kallaway, a witness produced on the trial on behalf of the plaintiff, testified, in substance that he was a witness to the accident; that at the time of its occurrence, he was standing at the northwest corner of 51st and State street, near the curb, and that it occurred between 4:30 and 5 o'clock on the afternoon of May 12, 1933; that the witness saw the street car from which plaintiff alighted, stop even with the drug store building line on the southeast corner of 51st and State street; that when the street car pulled away after plaintiff had alighted, a truck came between Mr. Fray, plaintiff, and the east curb of State street, and that the automobile came along and ran right into plaintiff, and that at that time, plaintiff was standing "right where he got off the street car, right in the same place;" that the automobile which struck plaintiff stopped after it crossed 51st street at a point about 150 feet from the northeast corner of the two streets; that at the time of the accident, the automobile was traveling at a speed of 45 to 50 miles an hour and was straddling the east rail of the northbound street car track; that the automobile was a Buick with two people in it; that the witness went over to get the license number of the car which struck the plaintiff, and that the man who hit plaintiff took plaintiff to the hospital; that at that time, the plaintiff was unconscious, and that the witness noticed blood on plaintiff's face, and that he had never seen plaintiff before the accident. On cross-examination, this witness testified to the effect that at the time of the accident, he had been standing on the corner for about five minutes, and that he saw one man get off

[illegible]

the street car after it had stopped, and that it was about five seconds from the time the street car pulled away until he saw the accident; that when he first saw the Buick car that struck plaintiff, it was about 13 feet from plaintiff, and that he then saw a truck traveling north between the plaintiff and the east curb of the street, and that after the accident, and after the Buick car which struck the plaintiff had crossed 51st street, the driver of the Buick car came back to where plaintiff was, and that the last he saw of plaintiff was when he was driven away in defendant's car.

Gertrude Moses, a witness on behalf of plaintiff, testified that at the time and place in question she was on her way home from work, and that she stopped at the southeast corner of 51st and State streets waiting for the traffic to pass; that she saw the street car come along and saw a man get off the front end and saw him stand there facing west; that the street car, when stopped, was even with the building line; that she saw a truck and an automobile coming from the south, the automobile following the truck; that just before the accident, she saw the automobile turn to the right, that the automobile which struck plaintiff ran with one wheel on the track and one wheel outside of the track and knocked the man down, and that the automobile proceeded quite a distance before it stopped in front of a dry goods store on the northeast corner of 51st and State street. On cross-examination, she testified to the effect that Mr. Fray, the plaintiff, was standing right where he was when he got off the street car when he was struck.

John Foster, a witness for the plaintiff, testified to the effect that at the time of the accident in question, he was walking west across State street, and had stopped for traffic at the northeast corner of 51st and State street, and that he saw a man get off the front end of the street car going north when the car stopped at the

south side of 51st and State street; that he saw the truck turn east on 51st street, and saw the street car pull ahead, and that at that time, the automobile was coming right behind the truck, and that as the truck turned east, the automobile cut out from behind the truck, and that it "cut right into this man"; that the automobile cut out from behind the left side of the truck. This witness testified that he estimated the speed of the automobile at the time to be from 40 to 45 miles an hour, and that after the accident, the automobile which struck plaintiff crossed 51st street and stopped two doors north of State street, and that after the accident, the witness dragged the plaintiff from where he was struck over to the curb. This witness also testified to the effect that when plaintiff was struck, his body was thrown so his head struck the west rail of the northbound track, and that he was lying 8 or 10 feet from the cross walk, and that after plaintiff got off the street car he did not move in any direction before he was struck.

Jesse Brown, a witness produced by plaintiff, testified to the effect that on May 12, 1933, the date of the accident, he saw a man get off the street car, and that at that time, the witness was walking west on 51st street; that he saw the truck with the trailer and the automobile, and that the latter "cut into him and went into him"; that at this time, the witness was on the southeast corner of 51st and State street, and that after the man was struck, the witness helped pull him to the sidewalk, and went to the hospital with him; that at that time, blood was running down the forehead of the man who was struck. This witness also testified to the effect that he had never seen plaintiff prior to this time. On cross-examination, this witness stated that just prior to the accident, he was waiting for the truck and automobile to pass.

Defendant testified that immediately prior to the time in question, he had been driving north in the northbound street car track

west side of East and Fifth streets; that he saw the front of the car on East street, and saw the driver get out of the car, and that at that time, the automobile was moving west behind the truck, and that the front turned east, the automobile out of line behind the truck, and that it came right into him; that the automobile was moving from behind the left side of the truck. This witness testified that he estimated the speed of the automobile at the time to be from 10 to 15 miles an hour, and that after the accident, the automobile which struck Plaintiff crossed East street and stopped on North street at 10th street, and that after the accident, the witness struck the Plaintiff from behind and was struck over the roof. This witness also testified to the effect that when Plaintiff was struck, his body was thrown so his head struck the west tail of the neighborhood truck, and that he was lying 8 or 10 feet from the west tail, and that after Plaintiff got off the street way he did not move in any direction before he was struck.

These three, a witness known to Plaintiff, testified to the effect that on May 12, 1921, the date of the accident, he saw a man get off the street car, and that at that time, the witness was walking west on East street; that he saw the truck with the trailer and the automobile, and that the latter "went into him and went into him"; that at that time, the witness was on the southeast corner of East and North streets, and that after the car was struck, the witness helped him to the sidewalk, and went to the hospital with him; that at that time, blood was running down the forehead of the man who was struck. This witness also testified to the effect that he saw never seen Plaintiff prior to this time. On cross-examination, this witness stated that just before the accident, he was walking for the truck and automobile to pass.

Defendant testified that immediately prior to the time an accident, he had been driving north in the neighborhood street car block

of State street from 55th to 51st street, and that he did not change his speed at any time; that as he passed 52nd street going north, there was no one ahead of his car on State street; that at 51st street he saw a big truck with a trailer, and that the witness slowed down his speed before crossing 51st street; that he saw the truck stop, and that then he, the witness, went ahead; that as he came up to 51st street, he did not see a colored man (the plaintiff) standing on the right hand side of the north bound track, or on the crosswalk; that he looked in all directions to see if anybody was there; that the first thing he knew of the accident was when his wife said to him, "You struck somebody"; that until his wife called his attention to the fact that he had struck somebody, he was not aware of this fact; that the witness took plaintiff to the Provident Hospital at 37th & Dearborn streets; that when he went back to where the plaintiff was lying, after the accident, he saw a number of men there; that he smelled the plaintiff's breath, and that plaintiff's breath indicated that he had been drinking. He further testified to the effect that when he came up to 51st street, he came almost to a stop, and that when he crossed 51st street, he was going between 10 or 12 miles an hour.

Gertrude Hale, the wife of the defendant, testified to the effect that at the time and place in question, her husband was driving the car; that they stayed on the street car track until the accident in question happened; that as they approached 50th street, they were not exceeding 15 miles an hour, because of the fact that there was a big truck coming from the east to the west, and that they slowed down for the truck; that there was no truck ahead of them on State street up to and including the time of the accident; that she did not see plaintiff standing at the right hand side, a distance of about 18 inches off the east rail on State street; that she saw nobody standing there, and that plaintiff's breath smelled as though he had been drinking.

of State Street from 1831 to 1832, and that he did not know
 his street at any time; that he was present there about 1832,
 there was no street at his own house street; that at 1832
 street he was a little street with a street, and that the witness always
 down his street between crossing his street; that he was the street
 street, and that when he, the witness, was present; that on the same day
 to the street, he did not see a colored man (the witness) standing
 on the right hand side of the street about 1832, or on the street;
 that he looked in all directions to see if anybody was there; that
 the first thing he saw of the accident was when his wife said to him
 "You struck somebody"; that when his wife said his attention to
 the fact that he had struck somebody, he was not sure of this fact;
 that the witness took himself to the Providence Hospital at 1832
 George street; that when he went back to where the plaintiff was
 lying, after the accident, he was a number of days there; that he
 visited the plaintiff's friends, and that the witness's friends told him
 that he had been drinking. He further testified to the witness that
 when he went up to his street, he was almost to a street, and that
 when he crossed his street, he was going between 10 or 12 miles an
 hour.
 George street, the wife of the defendant, testified to the
 effect that at the time and place in question, her husband was driving
 the cart; that they at first on the street but took until the accident
 in question happened; that as they approached 10th street, they were
 not excessive in either in hour, because of the fact that there was a
 big truck coming from the west to the east, and that they slowed down
 for the street; that there was no truck ahead of them on that street
 up to and including the time of the accident; that she did not see
 plaintiff standing at the right hand side, a distance of about 10
 inches off the east wall on State Street; that she saw nobody standing
 there, and that plaintiff's friends testified as though he had been
 drinking.

Asa Williams, a witness produced by defendant, testified to the effect that on May 12, 1933, he conducted a fruit stand at the northwest corner of 51st and State streets, and that his stand was at the curb; that on that day, between the hours of 5 and 5:30 o'clock in the evening, he was standing at his fruit stand and saw an accident; that he saw a man running from the northeast corner across, coming toward him, and that he was a colored man, and that this man ran into an automobile. He was asked this question: "Q. Was this man sitting at the table the man?" "A. I tell you, I don't remember, because I didn't go over there, because I didn't have anyone to notice my stand while I went over there to investigate." He further testified to the effect that the man was running fast, and that at that time, the automobile was 100 feet from the corner of 51st and State streets, going north on the northbound track.

A written motion for a new trial was filed, in which it is charged that the verdict is contrary to the manifest weight of the evidence, and it was also urged in this motion that a new trial should be granted because of newly discovered evidence. The affidavits of four persons were filed in support of the motion, and in each of them the affiant states that at the time and place in question, Asa Williams, the only disinterested witness offered by the defendant, did not operate a fruit stand on the northwest corner of 51st and State streets, as Williams testified that he did; also that Williams was not present at the time of the accident in question and could not have witnessed the same. A motion was made here to strike the affidavits filed in support of the motion for a new trial, which motion was reserved to the hearing. The motion is denied.

From the whole record, including these affidavits, we conclude that the court was in error in denying the motion for a new trial. The judgment is, therefore, reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

and William, a witness produced by defendant, testified to the effect that on May 12, 1935, he witnessed a fight which took place between the defendant and a man known as "Red" who was at the time of the fight, between the house at 2 and 3:30 o'clock in the evening, he was standing at the front door and saw the defendant; that he saw a man running from the defendant's house, coming toward him, and that he saw a man and a woman, and that this man ran into an automobile. He was asked this question: "The fact that you are sitting at the table and saying 'I will kill you, I will kill you' is not true, is it?" Answer: "I didn't say over there, because I didn't have any way of seeing up there while I was over there to investigate." He further testified to the effect that the man was running fast, and that at that time, the automobile was not fast from the house of the man and the woman, going north on the northwest street. A written motion for a new trial was filed, in which it is charged that the verdict is contrary to the weight of the evidence, and it was also urged in this motion that a new trial should be granted because of newly discovered evidence. The stipulation in that motion was filed in support of the motion, and in each of them the stipulation states that at the time and place in question, the defendant and the witness testified to the effect that the defendant, who was charged with the crime, was at the defendant's house at that time and place, and that the defendant was not present at the time and place in question. The stipulation was not signed by the defendant, and the stipulation was not signed by the witness. A motion was made to set aside the stipulation and to require the defendant to sign the stipulation, and the motion was denied. The motion is denied.

THE WHOLE RECORD, INCLUDING THE ALLEGEDLY, WE FIND THAT THE COURT IN ERROR IN GRANTING A NEW TRIAL FOR A NEW TRIAL. JUDGMENT IS, THEREFORE, REVERSED AND THE CASE IS REMANDED FOR A NEW TRIAL.

REVEREND AND HONORABLE THE JURY.

39300

EDWIN W. SIMS, FRANKLIN J. STRANSKY and
WALTER BREWER, co-partners, doing
business under the firm name and style
of SIMS, STRANSKY & BREWER,

Appellees.

v.

OTTO C. LIGHTNER and LIGHTNER PUBLISHING
CORPORATION, a corporation,

Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

292 I.A. 633²

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a judgment entered against them in the Circuit Court of Cook County on October 9, 1936, in an action to recover attorney's fees alleged to be due from defendants to plaintiffs. The judgment was entered on the verdict of a jury. Defendant, Otto C. Lightner, is the owner of the Lightner Publishing Company, a corporation, which with Lightner, had been made defendants in the Superior Court of Cook County in an action charging libel. The libel suit was brought by the Travel Guild, Inc., a corporation, against the two defendants. Plaintiffs are a partnership, consisting of Edwin W. Sims, Franklin J. Stransky and Walter Brewer, under the firm name of Sims, Stransky & Brewer, and were engaged in the practice of law. This firm defended the two defendants in the libel case, and this suit is brought to recover for services rendered in that case.

Timothy I. McKnight, a witness for the plaintiffs, testified that he is a member of the Illinois bar; that he was admitted to practice on October 8, 1915; that he began practicing law at Carrollton, Greene County, Illinois, and was elected State's Attorney of Greene County in 1920 and reelected in 1924; that he thereafter practiced law in East St. Louis for a period of two years, and that he then came to Chicago and became associated with plaintiffs' firm. He further testified to the effect that he had known the defendant, Otto C. Lightner since 1928, between which year and 1933, he had, on behalf

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333.41293

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

[illegible]

The District Court at New Orleans on October 8, 1960, in an opinion by Judge J. Edgar Adams, held that the Government's case against the defendant was insufficient to sustain the conviction. The judgment was entered on the verdict at a jury trial.

...with which it has been made before in the ... of the ...

and was brought by the Travel Guide, Inc., a corporation, which

As the defendant, Plaintiff has a responsibility to maintain the

DATE: 11-11-61, TIME: 10:00 AM, LOCATION: 1000 10th St, NW, WASHINGTON, D.C.

Some of the most important of these are:

law. This illustrates the importance of the legal system, and

THIS CASE IS BEING HANDLED BY THE BUREAU OF INVESTIGATION.

... ..

1950-1951

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CONFIDENTIAL - SECURITY INFORMATION

As to the 1942-43 season, the 1942-43 season was a period of low water, and this is the reason

o. Whiskers and bones associated with glabella? (limb)

1. The first step is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

1. 1944 - 1945 - 1946 - 1947 - 1948 - 1949 - 1950 - 1951 - 1952 - 1953 - 1954 - 1955 - 1956 - 1957 - 1958 - 1959 - 1960 - 1961 - 1962 - 1963 - 1964 - 1965 - 1966 - 1967 - 1968 - 1969 - 1970 - 1971 - 1972 - 1973 - 1974 - 1975 - 1976 - 1977 - 1978 - 1979 - 1980 - 1981 - 1982 - 1983 - 1984 - 1985 - 1986 - 1987 - 1988 - 1989 - 1990 - 1991 - 1992 - 1993 - 1994 - 1995 - 1996 - 1997 - 1998 - 1999 - 2000 - 2001 - 2002 - 2003 - 2004 - 2005 - 2006 - 2007 - 2008 - 2009 - 2010 - 2011 - 2012 - 2013 - 2014 - 2015 - 2016 - 2017 - 2018 - 2019 - 2020 - 2021 - 2022 - 2023 - 2024 - 2025 - 2026 - 2027 - 2028 - 2029 - 2030 - 2031 - 2032 - 2033 - 2034 - 2035 - 2036 - 2037 - 2038 - 2039 - 2040 - 2041 - 2042 - 2043 - 2044 - 2045 - 2046 - 2047 - 2048 - 2049 - 2050 - 2051 - 2052 - 2053 - 2054 - 2055 - 2056 - 2057 - 2058 - 2059 - 2060 - 2061 - 2062 - 2063 - 2064 - 2065 - 2066 - 2067 - 2068 - 2069 - 2070 - 2071 - 2072 - 2073 - 2074 - 2075 - 2076 - 2077 - 2078 - 2079 - 2080 - 2081 - 2082 - 2083 - 2084 - 2085 - 2086 - 2087 - 2088 - 2089 - 2090 - 2091 - 2092 - 2093 - 2094 - 2095 - 2096 - 2097 - 2098 - 2099 - 2100 - 2101 - 2102 - 2103 - 2104 - 2105 - 2106 - 2107 - 2108 - 2109 - 2110 - 2111 - 2112 - 2113 - 2114 - 2115 - 2116 - 2117 - 2118 - 2119 - 2120 - 2121 - 2122 - 2123 - 2124 - 2125 - 2126 - 2127 - 2128 - 2129 - 2130 - 2131 - 2132 - 2133 - 2134 - 2135 - 2136 - 2137 - 2138 - 2139 - 2140 - 2141 - 2142 - 2143 - 2144 - 2145 - 2146 - 2147 - 2148 - 2149 - 2150 - 2151 - 2152 - 2153 - 2154 - 2155 - 2156 - 2157 - 2158 - 2159 - 2160 - 2161 - 2162 - 2163 - 2164 - 2165 - 2166 - 2167 - 2168 - 2169 - 2170 - 2171 - 2172 - 2173 - 2174 - 2175 - 2176 - 2177 - 2178 - 2179 - 2180 - 2181 - 2182 - 2183 - 2184 - 2185 - 2186 - 2187 - 2188 - 2189 - 2190 - 2191 - 2192 - 2193 - 2194 - 2195 - 2196 - 2197 - 2198 - 2199 - 2200 - 2201 - 2202 - 2203 - 2204 - 2205 - 2206 - 2207 - 2208 - 2209 - 2210 - 2211 - 2212 - 2213 - 2214 - 2215 - 2216 - 2217 - 2218 - 2219 - 2220 - 2221 - 2222 - 2223 - 2224 - 2225 - 2226 - 2227 - 2228 - 2229 - 2230 - 2231 - 2232 - 2233 - 2234 - 2235 - 2236 - 2237 - 2238 - 2239 - 2240 - 2241 - 2242 - 2243 - 2244 - 2245 - 2246 - 2247 - 2248 - 2249 - 2250 - 2251 - 2252 - 2253 - 2254 - 2255 - 2256 - 2257 - 2258 - 2259 - 2260 - 2261 - 2262 - 2263 - 2264 - 2265 - 2266 - 2267 - 2268 - 2269 - 2270 - 2271 - 2272 - 2273 - 2274 - 2275 - 2276 - 2277 - 2278 - 2279 - 2280 - 2281 - 2282 - 2283 - 2284 - 2285 - 2286 - 2287 - 2288 - 2289 - 2290 - 2291 - 2292 - 2293 - 2294 - 2295 - 2296 - 2297 - 2298 - 2299 - 2300 - 2301 - 2302 - 2303 - 2304 - 2305 - 2306 - 2307 - 2308 - 2309 - 2310 - 2311 - 2312 - 2313 - 2314 - 2315 -

of plaintiffs, attended to various matters for Lightner; that on November 21, 1933, Lightner called this witness by telephone at about 4 o'clock in the afternoon, and informed the witness that he had a lawsuit which was coming on for trial on November 23, 1933, and that another lawyer had filed an answer for Lightner in the suit, and that Lightner requested the witness to represent him in the case. McKnight testified that Lightner then informed the witness that the Travel Guild had sued him for libel, and had claimed damages in the sum of \$10,000.00; that the witness stated to Lightner that "If I try this case, I want a definite understanding as to what our fees will be," and that Lightner asked, "Well, why?" and that the witness replied, "Because you failed to pay me everything in the Osborne case." This last answer was objected to, and objection overruled. The witness then continued and stated to Lightner that "in the Osborne case, where I had no written agreement with you, you beat me out of \$150 and went back on the agreement, the oral agreement, and I have got to have a definite agreement with you on what I will charge," and that Lightner then asked, "What will it be?" and that the witness replied, "\$100.00 a day of six hours out of court, and \$150.00 a day for time spent in court;" that after some objection as to the price, Lightner stated to the witness, "All right, go ahead." At this point in the testimony of the witness, he produced a copy of a letter from plaintiffs to defendants, which was received in evidence with the consent of defendants' counsel, and in which the following statement was made: "If you desire us to represent you, we should be glad to do so upon our regular terms, which are \$100.00 per day of six hours each for time spent in preparation, and \$150.00 per day of six hours each of time actually spent in court." This witness then testified to the effect that he procured a continuance of the libel suit against defendants, and filed a demurrer to the declaration filed in that case. He also testified to the effect that he advised

of plaintiff, attended in various matters for plaintiff, and on November 21, 1907, plaintiff called this witness by telephone at about 4 o'clock in the afternoon, and instructed the witness that he had a lawsuit which was pending on the order on November 21, 1907, and that another lawyer had filed an answer for plaintiff in the suit, and that plaintiff requested the witness to represent him in the suit. Notwithstanding plaintiff told plaintiff that defendant the witness that the travel agent had told him for himself, and had visited defendant in the sum of \$10,000.00; that the witness stated to plaintiff that "if I win this case, I want a definite understanding as to what you have will be," and that plaintiff asked, "well, why?" and that the witness replied, "because you tried to get me everything in the contract, and," and that witness was objected to, and objection overruled. The witness then questioned and asked to plaintiff that "in the O'clock case, where I had no written agreement with you, you paid me out of \$100 and went back on the agreement, the oral agreement, and I gave you to have a definite agreement with you on what I will charge," and that plaintiff then asked, "What will it be?" and that the witness replied, "I'll give you a tip of six hours out of court, and \$100.00 a day for time spent in court;" that after some objection as to the time, plaintiff asked to the witness, "If I win, you agree," and this was in the testimony of the witness, as produced a copy of a letter from plaintiff to defendant, which was received in evidence with the contract of defendant's contract, and in which the following statement was made: "If you desire me to represent you, we should be glad to do so on our regular terms, which are that, 50 per cent of six hours work but time spent in investigation, and \$100.00 per day of six hours work of time actually spent in court." This witness then testified as the witness had testified a statement of his trial suit against defendant, and filed a document in the handwriting filed in that case. He also testified as the witness that he advised

the defendants as to their defense, made a careful study of the law in the case, argued the demurrer, and that after such argument, the trial court advised the counsel for plaintiffs in the libel suit, that the declaration was insufficient, and that thereupon counsel for plaintiffs in the libel suit obtained leave to amend the declaration, which declaration was amended, and that thereafter the witness filed pleas to the declaration; that after the libel suit was at issue, he obtained continuances from time to time; that finally the case was on for trial on October 11, 1934; that a jury was procured, the trial lasting one day, and the jury returned a verdict of not guilty. Motions for a new trial were made by counsel for plaintiffs, which were overruled. An itemized bill was presented by plaintiffs to the defendants for services in the libel suit, showing, what plaintiff's claim, shows the exact time spent in the preparation of the case for trial, together with various appearances in court and trial. The bill is for services for a total of six days of six hours each spent upon preparation and various appearances in court, and in addition the sum of \$150.00 for the trial of the case, making a total of \$750.00 for services claimed to have been rendered. In addition to this, the sum of \$23.10 is claimed for cash disbursements alleged to have been made by plaintiffs. The total bill amounts to \$773.10, of which defendants, on January 10, 1934, paid \$100.00, leaving a balance of \$673.10.

Defendants' grounds for reversal are that they did not have a fair trial, that the verdict is excessive and the result of passion and prejudice on the part of the jury, and that no contract was proven by plaintiffs with defendants for any fees to be paid beyond the sum of \$100.00, which was paid.

The defendant, Otto C. Lightner, was the only witness produced by the defendants. His testimony is to the effect that on November 21, 1933, he had a personal conference with Mr. McKnight of

the defendant as to their behavior, with a written copy of the law in the case, signed the document, and that after some discussion, the trial court advised the defendant for plaintiff in the trial bill, that the declaration was insufficient, and that defendant should for plaintiff in the trial bill advised before to amend the declaration, which declaration was amended, and that thereafter the witness filed plans to the declaration; that after the trial bill was filed, he obtained continuances from time to time; that finally he came on for trial on October 11, 1911; that a jury was summoned, the trial lasting one day, and the jury returned a verdict of not guilty. Motions for a new trial were made by counsel for plaintiff, which were overruled. An amended bill was presented by plaintiff to the defendant for recovery in the trial bill, showing what plaintiff's claim, shows the exact time spent in the prosecution of the case for trial, together with various expenses in court and trial. The bill is for services for a total of six days of six hours each spent upon preparation and various expenses in court, and in addition the sum of \$115.00 for the trial of the case, making a total of \$735.00 for services claimed to have been rendered. In addition to this, the sum of \$25.10 is claimed for other disbursements alleged to have been made by plaintiff. The total bill amounts to \$760.10, of which defendant, on January 10, 1912, paid \$100.00, leaving a balance of \$660.10.

Defendant's account for recovery is that they all now have a trial bill, that the verdict is adverse and the result of plaintiff and preparing on the part of the jury, and that on defendant and recovery plaintiff with defendant for any case to be paid toward the sum of \$760.00, which was paid.

The defendant, John E. Lightner, was the only witness produced by the defendant. His testimony is to the effect that on November 11, 1911, he had a personal conference with Mr. defendant of

the law firm of Sims, Stransky & Brewer; that he explained to him the nature of the libel case and informed him that he had received a summons therein; also, that he asked Mr. McKnight what it would cost to have him, McKnight, handle the case, that McKnight said he would take it for \$100.00, that the witness told McKnight that he would send him the \$100.00 as soon as he "got a little ahead", and that there was nothing said by defendant ^{or McKnight} as to the payment of \$100.00 for every six hour day of preparation and \$150.00 for each day of trial. This witness also testified to this effect that at the time of this conversation, there was no one in the office but himself and McKnight, except one or two lawyers who came in and went out almost immediately. He further testified that he did not receive the letter referred to by McKnight, in which McKnight is alleged to have stated that a charge of \$100.00 a day of six hours each for preparation and \$150.00 a day for trial, would be the charge of plaintiffs for services in the case. (Before the trial, defendant had been served with a notice to produce the original of this letter.) This witness also testified that he had received no itemized bill for plaintiffs' alleged services, although the uncontradicted evidence is that plaintiffs did send him such an itemized bill.

Thomas Hart, a witness for the plaintiffs, and an attorney-at-law, testified that at the times in question, he was associated with the firm of Sims, Stransky & Brewer; that he, together with McKnight, rendered services in the libel suit against Mr. Lightner and his firm; that he, the witness, examined memoranda in his own handwriting as to the time spent in preparation of the trial of the case and in court, the argument of demurrers to the original declaration, which, after filing, was amended; that he frequently discussed the case with Mr. Lightner, and that the time spent, as shown by the bill presented to Lightner, is correct. This witness also testified

the law firm of Rice, Ramsey & Brown; that he explained to him the
nature of the legal case and informed him that he had received a
summons (thereby) also, that he asked Mr. Williams what it would cost
to have him, Williams, handle the case, and Williams said he would
take it for \$250.00, that the witness took Williams out to lunch
and said the \$250.00 was worth it, "for a little speed", and that
there was nothing said by Williams as to the payment of \$250.00
for every six hour day of preparation and \$150.00 for each day of
trial. This witness also testified to the effect that at the time
of this conversation, there was no one in the office but himself and
Williams, except one or two lawyers who were in and went out alone
immediately. He further testified that on all the matters and letters
referred to by Williams, in which matters he alleged to have acted
that a check of \$250.00 a day of six hours each for preparation and
\$150.00 a day for trial, would be the charge of Williams for services
in the case. (Before the trial, Williams had been served with a
notice to produce the original of this letter.) This witness also
testified that he had received no subpoena for Williams' trial
services, although the undersigned believes that Williams did
bring him such an intended bill.

Thomas Galt, a witness for the Williams, and in testimony-
thereof, testified that at the time in question, he was conversing
with the firm of Rice, Ramsey & Brown; that he, Galt, testified also
Williams, received services in the legal case against Dr. Lightner
and his firm; that he, Galt, also stated, estimated somewhere in the sum
of \$250.00 to be the time spent in preparation of the trial of the
case and in court, the payment of Williams for the original decision
trial, which, Galt stated, was made; that he is personally acquainted
the case with Dr. Lightner, and that the firm of Rice, Ramsey & Brown
will represent to Lightner, in court. This witness also testified

that he was not present when any arrangement was made between Lightner and McKnight as to fees. There is not a word of proof offered to dispute the claims of plaintiffs for the time spent in the preparation of the trial, and that the time spent prior to the trial, are not correct.

There were two counts in the declaration filed in this cause, one based upon an oral contract between the plaintiffs and defendants, by which it is alleged that defendants agreed to pay plaintiffs \$100.00 a day of six hours for time spent in the preparation of the case, and \$150.00 a day for time actually spent in the trial, and the other based upon quantum meruit. Three members of the Chicago Bar were produced by plaintiffs on the question as to what would be a reasonable fee to be charged for plaintiffs' alleged services. After being told what were claimed to have been the services rendered by plaintiffs, one testified that a reasonable fee would be \$1,000, another \$900, and another \$1,350.

Defendants claim they did not have a fair trial, because of the fact that in McKnight's testimony, in relating his conversation with the defendant Lightner, at the time Lightner spoke to McKnight and asked McKnight to take charge of his case, McKnight testified that he told Lightner that he wanted a definite arrangement made before he would accept a retainer, because "In the Osborne case, where I had no written agreement with you, you beat me out of \$150.00 and went back on the agreement, the oral agreement, and I have got to have a definite agreement with you on what I will charge you." Mr. Lightner does not deny that this conversation took place. He does deny that there was any definite agreement with him that he should pay more than \$100.00 for the preparation and trial of his libel suit. He admits that he called McKnight up, and if the matter objected to was part of the conversation between the parties at that time, we see

that he was not present when the agreement was made between
 defendant and plaintiff as to fees. There is not a word of proof
 offered to disprove the claim of plaintiff for the time spent in the
 preparation of the trial, and that the time spent prior to the trial
 was not material.

There were two counts in the declaration filed in 1914
 cause, and there was an oral contract between the plaintiff and
 defendant, by which it is alleged that defendant agreed to pay
 plaintiff \$100.00 a day of six hours for time spent in the preparation
 of the case, and \$150.00 a day for time actually spent in the trial,
 and the other named a written contract. These amounts of the claim
 for were introduced by plaintiff in the question as to what would be
 a reasonable fee to be charged for plaintiff's alleged services.
 After being told what was claimed to have been the services rendered
 by plaintiff, one testified that a reasonable fee would be \$1,500,
 another \$200, and another \$1,200.

Defendant also testified that he had a fair trial, because
 of the fact that in defendant's testimony, in relation to his agreement
 with the defendant as to fees, at the time plaintiff agreed to testify
 and asked plaintiff to take charge of his case, defendant testified
 that he told plaintiff that he would a definite arrangement made
 before he would accept a case, because in the future case, when
 I had no written agreement with you, you paid me out of \$100.00 and
 went back on the agreement, the oral agreement, and I have not yet
 made a definite agreement with you on that I will charge you, \$1.
 Plaintiff does not deny that this conversation took place. He does
 deny that there was any definite agreement with him that he should
 pay more than \$150.00 for the preparation and trial of his case. He
 admits that he called plaintiff up, and in the matter referred to
 was told of the conversation between the parties at that time, he was

no reason why it should not have been admitted in evidence. Further, even though it was error to admit it, the error was harmless. There is no claim that the jury was improperly instructed. The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

no reason why it should not have been admitted in evidence. Further even though it was error to admit it, the error was harmless. There is no claim that the jury was improperly instructed. The judgment of the Circuit Court of Cook County is affirmed.

APPROVED.

HENRY, P. J. AND JAMES E. WATKINS, J. J. CONSENT.

39372

J. D. MIKEL,

Appellant,

v.

ILLINOIS RACING COMMISSION, et al.,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

292 I.A. 633³

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Superior Court of Cook County, denying the motion of the plaintiff to vacate an order theretofore entered quashing a writ of certiorari and dismissing the proceeding. The writ was issued on the petition of the plaintiff.

On November 4, 1935, this petition was filed in the Superior Court of Cook County by J. D. Mikel, in which he charges, inter alia, that he is a resident and citizen of the State of Illinois; that he operates a stock farm in the state where he is engaged in the business of raising thoroughbred horses; that on August 15, 1935, while his horses were quartered in stables at the Lincoln Fields Jockey Club in this state, he was served with a notice on behalf of the Illinois Racing Commission by George H. Foster, its secretary, to the effect that plaintiff be and he was thereby ruled off for life from the race courses under the jurisdiction of the Illinois Racing Commission, for having entered and raced a horse, My Bane, in a race on August 15, 1935, as a two year old maiden, when as a matter of fact, the horse was three years old at the time, and that such action was an offense and in violation of the rules covering corrupt practice. It is further recited in plaintiff's petition that on October 25, 1935, the Illinois Racing Commission entered an order in its records to the effect that "My Bane" was born in the year 1932, that "My Bane" was broken as a yearling in 1933, that the colt "My Bane" was gelded in the year 1933, and that no notice thereof was given to the Jockey Club, and that the

STATE

J. C. BIRCH,

Appellant,

v.

ILLINOIS WOLFE COMPANY, et al.,

Appellees.

INVESTIGATION

STATE COURT

COOK COUNTY.

2221.A.633

MR. JUSTICE WILLIAM THE OFFICE OF THE COURT.

There is an appeal from an order of the Superior Court of Cook County, denying the motion of the plaintiff to vacate an order theretofore entered granting a writ of certiorari and dissolving the proceedings. The writ was issued on the petition of the plaintiff.

On November 4, 1930, said petition was filed in the Superior Court of Cook County by J. C. Birch, in which he prayed, inter alia, that he is a resident and citizen of the State of Illinois that he operates a retail store in the State where he is engaged in the business of retail photographing; that on August 18, 1930, said his horses were quarantined in violation of the Illinois Police Board and in this State, he was served with a notice on behalf of the Illinois being demanded by George E. Foster, the secretary, for the writ that plaintiff he and he was thereby told all his life from the time course under the jurisdiction of the Illinois Police Board, having entered and owned a horse, by name, in a race on August 18, 1930, as a two year old colt, when as a matter of fact, the horse was three years old at the time, and that when taken was an Illinois and in violation of the Police Board's orders. It is further pointed in plaintiff's petition that on October 20, 1930, the Illinois Police Board ordered an order in its records to the effect that "my horse" was born in the year 1928, that "my horse" was taken as a foal in 1928, that the said "my horse" was taken in the year 1928, and that no notice of said order was given to the plaintiff, and that the

horse "My Bane" was a racing three year old on August 15, 1935. Also, that the registration certificate of the Jockey Club of the horse "My Bane" was issued under false representation of the date of birth contained in the application for registration made by plaintiff on October 9, 1933, and that the Racing Commission then ordered that the license issued to J. D. Mikel be revoked, and that he be denied all privileges of the respective race courses of the Illinois Racing Commission. The petition further recites that "An Act to provide for, regulate and license horse racing in the State of Illinois; to legalize and permit the pari-mutuel or certificate method of wagering on the result of horse races at licensed racing meetings in said State, to render inapplicable certain Acts in conflict therewith, and to provide penalties for the violation thereof", is in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States; that the statute violates Section 23 of Article 4 of the Constitution of the State of Illinois; that by Section 10 of the act, it grants a special and exclusive immunity in providing that "such pari-mutuel or certificate method of wagering upon such horse races held at said track and within such race track and at such horse racing meeting shall not under any circumstances, if conducted under the provision of this Act, be held or construed to be unlawful, other statutes of the State of Illinois to the contrary notwithstanding", and that the statute violates Section 13 of Article 4 of the Constitution of the State of Illinois.

Upon the presentation of the petition, the court ordered the writ of certiorari to issue, and in the writ, ordered the Racing Commission and its officers to bring in the records of their proceedings concerning the matters set forth in the petition, and to produce the same in open court. After the issuance of the writ, the Racing Commission, through its officers, filed an answer and a motion to dismiss the petition and to quash the writ of certiorari upon the ground that

the court had no jurisdiction over the subject matter in the petition, for the reason that the petition did not set forth any legal or equitable rights which the Racing Commission had violated, and for the further reason that there was pending and undisposed of in the Superior Court of Cook County, a proceeding in equity, (giving the number of that case) wherein the identical parties and the same subject matter were involved as are involved in the instant proceeding, and that the petition filed is insufficient in law to support the issuance of the writ of certiorari and fails to state facts establishing a legal duty owed to the plaintiff by the defendants, and fails to state any violation of duty owed to the plaintiff by defendants. In plaintiff's petition, and in support of it in the Superior Court of Cook County, the only ground urged for the issuing of the writ was that the act in question was unconstitutional.

In People v. Monroe, 349 Ill. 270, the question of the validity of the entire act in question was directly raised, and after thoroughly reviewing the act, and in an exhaustive opinion, the Supreme Court said:

"Suffice it to say that we have carefully examined each case cited and very many others bearing on the questions involved, and as a result of our investigation are of the opinion that the Horse Racing act is complete in itself and is a valid enactment."

As to this court, the opinion of the Supreme Court is controlling.

As already suggested, in their answer to plaintiff's petition, defendants state that at the time of filing the petition herein, there was pending in the Superior Court of Cook County a bill in equity filed by the plaintiff, which asks for the same relief, in effect, as that prayed here. This is not denied.

In Mathias v. Mason, 66 Mich. 524, writs of certiorari were issued to review two proceedings of the drainage commissioners of a certain county in the state of Michigan for the establishment of two drains, and there, as here, upon a hearing, the writs were dismissed

the court had no jurisdiction over the subject matter in the petition, for the reason that the petition did not set forth any legal or equitable rights which the United States had violated, and for the further reason that there was nothing and nothing of in the petition itself of such gravity, as presented in equity, (giving the matter of that case) within the judicial power and the very subject matter was involved as are involved in the instant proceeding, and that the petition filed is insufficient in law to support the issuance of the writ of certiorari and will be so held. There is nothing in the petition to show that it is the plaintiff's, and that it is the plaintiff's violation of duty owed to the plaintiff by defendant, in plaintiff's petition, and in support of it is the defendant's duty of good faith, and the only ground urged for the issuance of the writ was that and not in question was unconstitutional.

In United v. Brown, 241 U.S. 279, the issuance of the writ of certiorari was denied, and the validity of the writ was directly raised, and after thorough review of the case, and in an exhaustive opinion, the Supreme Court said:

"Certiorari is an extraordinary remedy, and is not to be granted unless there is a clear and strong showing of the necessity of its issuance, and as a result of such investigation and of the evidence that the writ should not be granted is itself not a valid ground."

As to this court, the issuance of the writ was denied, and it is almost suggested, in sharp answer to plaintiff's petition, defendant states that at the time of filing the petition herein, there was nothing in the transfer of the County of Cook County - and in equity there by the plaintiff, which would have been relied, in equity, as a ground for the writ. This is not denied.

In United v. Brown, 241 U.S. 279, with its reversal, was issued to review the proceedings of the Illinois Commission of the State of Illinois in the matter of the issuance of the writ of certiorari, and there, upon a review, the writ was denied.

as improvidently granted. The returns showed that the petitioner had paid the assessments under protest, and had sued to recover the money paid. Upon a review of the order dismissing the writs, the Supreme Court of Michigan said:

"In these two cases plaintiff in certiorari complains of certain irregularities which, if well alleged, and if so declared, he claims would avoid the assessments charged against him. The return takes some exceptions to his standing in court on the general merits, but shows further that he has paid the assessments under protest, and sued to recover back the money.

"As a certiorari is not a matter of right in these cases, it has generally been refused if other remedies are available, unless under peculiar circumstances. Here the plaintiff has elected another remedy, under which he can obtain full redress if the assessments are illegal, and if he has not paid them voluntarily. There would be no propriety in allowing him a double remedy, and he should be confined to the common-law action he has chosen."

See also Flanders v. Roberts, 183 Mass. 534.

We are of the opinion that the points raised on appeal are without merit, and that the judgment of the Superior Court of Cook County should be and it is hereby affirmed.

AFFIRMED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

as involuntarily granted. The return showed that the petitioner had
said the statements under protest, and had been to recover the money
paid. Upon a review of the other disclosures the writ, the return
Court of Appeals said:

"It seems to me that the petitioner is entitled to recovery
of certain items which he paid under protest, and it is so
decided, as it is to avoid the statements under
protest. The return shows that the petitioner is not entitled
in court on the general writ, but since the writ is
not paid the statements under protest, and it is to recover
back the money.
The petitioner is not a holder of right in these items,
it has generally been held in other cases that the petitioner
under such circumstances, since the petitioner has
altered another party, under which he has not paid the
it has generally been held, and it has not paid the
voluntarily. There would be no recovery in this case
double recovery, and he should be confined to the common-law
action on his contract."

See also Flanagan v. Flanagan, 133 Mass. 504.

On the other hand, the opinion of the court in Flanagan is
without merit, and that the judgment of the Superior Court of Cook County
should be affirmed as it is hereby affirmed.

ALFRED.

WHEAT, J. and CHAS. E. WHEAT, J. JUDGES.

39793

FRANCIS E. TOWNSEND,
Appellant,

vs.

J. W. BRINTON,
Appellee.

INTERLOCUTORY APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

292 I.A. 633⁴

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a temporary injunction restraining him from interfering with the rights of defendant as holder and who claims to hold as pledgee of seventeen shares of the capital stock of the Prosperity Publishing Company, Ltd., a California corporation.

Plaintiff first filed his complaint alleging that he owned and was entitled to possession of the certificate of the seventeen shares of stock of the Publishing company; that defendant was the general manager, director and vice-president of this company; that the stock certificate in question was placed in a safe deposit box; that subsequently plaintiff discovered that it was missing from the box and that defendant had possession of it, claiming to own it; plaintiff asked that defendant be enjoined from disposing of, concealing or removing from the jurisdiction of the court the certificate. Other matters relating to property of the Publishing company were presented in plaintiff's complaint and injunctions sought with reference to them.

Defendant filed an answer and counterclaim in which he denied, among other things, that plaintiff was the owner of the shares of stock and alleged that the certificate was delivered to defendant by plaintiff as security for the performance by plaintiff of a contract of employment entered into by them; that it was agreed between the parties that defendant should manage and have complete

J. F. BAKER, Plaintiff,
 vs.
 JAMES M. BAKER, Defendant.
 Appeal.
 COURT OF COMMON PLEAS.

2021.A.633

ALL JUSTICE MERRILL DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a summary judgment rendered in favor of defendant with the issue of defendant as holder and a claim to hold as defendant. It appears from the the record of the property that the company, J.M.B., a California corporation.

Plaintiff first filed his complaint alleging that he owned and was entitled to possession of the certificate of the shares of stock of the Publishing company; that defendant was the General manager, director and vice-president of this company; that the stock certificate in question was placed in a safe deposit box; that subsequently plaintiff discovered that it was missing from the box and that defendant had possession of it, claiming to own it; plaintiff asked that defendant be enjoined from disposing of, conveying or removing from the jurisdiction of the court the certificate. Other matters relating to property of the Publishing company were presented in plaintiff's complaint and injunctions sought with reference to them.

Defendant filed an answer and counterclaim in which he denied, among other things, that plaintiff was the owner of the shares of stock and alleged that the certificate was delivered to defendant by plaintiff as security for the performance by plaintiff of a contract of employment entered into by them; that it was turned between the parties that defendant would manage and have complete

charge and control of the employees and personnel of the Publishing company, the Townsend National Recovery ^{Plan} Plan, Inc. and Old Age Revolving Pensions, Ltd., all of which were then controlled by plaintiff; that no indebtedness would be incurred for or on behalf of said corporations without the prior consent and approval of defendant; that defendant should receive for his services \$10,000 a year. It was further alleged that it was agreed that plaintiff would deliver to defendant properly endorsed certificates evidencing ownership of the shares in question to secure payment of defendant's salary and the performance by plaintiff of the terms and provisions of the contract of employment; that thereupon, pursuant to the contract, defendant entered upon the performance of his duties as general manager of the above named corporations and the certificate of stock was duly endorsed, delivered to defendant, and is now in his possession; that shortly thereafter plaintiff violated the terms of the contract of employment and defaulted in the performance thereof in many respects which are detailed in the counterclaim and unnecessary to set forth here; that plaintiff was representing himself to be the owner of the shares of stock and was attempting to exercise the rights and prerogatives of owner of the stock and had done many other things interfering with the rights of defendant. Defendant prayed for a temporary injunction restraining plaintiff from asserting the rights of an owner of said shares of stock until the further order of court. After hearing, the temporary injunction was issued and plaintiff appeals.

Plaintiff says that defendant's counterclaim stated no ground for equitable relief and that what rights he had, if any, should be pursued in an action at law, to which defendant properly replies that as plaintiff himself invoked the aid of a court of

equity he should not be heard to question the jurisdiction of this court over the matters set forth in the counterclaim, citing Zollman v. Jackson Trust & Sav. Bank, 238 Ill. 290, 295, and other cases.

Since the subject matter of the controversy was the control of the Townsend companies, and the ownership of the certificate of stock of the Prosperity Publishing company, the case is peculiarly for the exercise of the jurisdiction of a court of equity. When a court of equity once obtains jurisdiction it will retain it to do complete justice between the parties. Longshore v. Longshore, 200 Ill. 470, 476, and many other cases.

Moreover, under the Practice act, chap. 110, sec. 44 (1) defendant is permitted to set up any cross demands in equity, and Rule 10 of the Supreme court is to the same effect. The opposing claims of the parties are properly cognizable in the equity court.

Plaintiff's brief presents its argument to this court as if we were passing upon a demurrer or upon the ultimate rights of the parties. This is not the purpose of the interlocutory appeal. The question presented by an interlocutory appeal is a preliminary one and not ultimately decisive of the cause. The People v. Standidge, 333 Ill. 361, 365. In McDougall Co. v. Woods, 247 Ill. App. 170, after citing many cases, we refused to pass upon the demurrability of the bill or the merits of the cause, but we reviewed the exercise of the discretion lodged in the chancellor with the purpose of determining whether the interlocutory order probably was necessary to retain the status quo and preserve the equitable rights of the parties. See also Friedman v. Peckler, 255 Ill. App. 199, and Lincoln Trust & Sav. Bank v. Nelson, 261 Ill. App. 370.

It was no abuse of discretion to issue the temporary injunction before us. The right to possession of the certificate of

equity he should not be held to question the jurisdiction of this court over the matter set forth in the complaint, citing Johnson v. Johnson, 233 Ill. 478, 233 Ill. 479, and other cases.

Since the subject matter of the controversy was the equity of the defendant company, and the terms of the certificate of stock of the Prosperity Publishing Company, the case is peculiarly for the exercise of the jurisdiction of a court of equity. When a court of equity once obtains jurisdiction it will retain it to do complete justice between the parties. Johnson v. Johnson, 233 Ill. 478, 233 Ill. 479, and many other cases.

Moreover, under the practice set forth in Ill. 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Plaintiff's brief presents the argument to this court as if we were passing upon a demurrer or upon the plaintiff's motion to dismiss. This is not the nature of the interlocutory appeal. The question presented by an interlocutory appeal is a preliminary one and not ultimately decisive of the case. The People v. ... In Johnson v. Johnson, 233 Ill. 478, 233 Ill. 479, after citing many cases, we refused to pass upon the demurrability of the bill or the merits of the case, but we refused the motion to dismiss because the motion was premature. The purpose of determining whether the interlocutory order properly was necessary to retain the status quo and preserve the plaintiff's rights of the parties. See also Johnson v. Johnson, 233 Ill. 478, 233 Ill. 479, and Johnson v. Johnson, 233 Ill. 478, 233 Ill. 479. It was no cause of dissolution because the temporary injunction between us. The right to possession of the certificate of

stock was in issue. It was in the possession of defendant and the court properly could order that it should remain there until the further order of the court.

The colloquy of counsel with the court indicates clearly that the order was understood by all merely as maintaining the status quo until the matter could be heard on its merits, which apparently would be determined speedily.

Other criticisms are made by plaintiff but we can see no good reason to disturb the temporary order, and it is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

39215

WESLEY M. CLEVELAND,

Plaintiff- Appellee,

v.

RECONSTRUCTION FINANCE CORPORATION,

Defendant - Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

292 I.A. 634¹

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF
THE COURT.

Plaintiff, Wesley M. Cleveland, brought suit against the Reconstruction Finance Corporation, defendant herein, to recover a certain real estate commission claimed to have been earned and due him as a result of the sale of a certain house and lot known as the Turley property located at 835 Cortland avenue, Park Ridge, Illinois. The cause was tried before the court without a jury, resulting in a verdict in favor of plaintiff for the sum of \$350.00, from which this appeal is taken.

The evidence shows that the defendant, Reconstruction Finance Corporation is a governmental agency, created, among other things, for the purpose of aiding banks whose assets are not readily saleable; that the property herein mentioned was one of the assets of the Central Republic Trust Company, which bank went into the hands of a receiver and the property aforesaid became one of the assets of said receivership, title to the same being in a nominee of the receiver, Roy L. Wakefield.

The evidence further shows that the defendant, who had evidently advanced some money to aid said defunct bank, was endeavoring to sell this property for the sum of \$7,500.00; that in February, 1935, one Frank W. Hancock was looking for a home to purchase and called upon plaintiff Cleveland, a licensed real estate broker; that Cleveland showed Hancock, among other houses, the premises at 835 Cortland avenue, Park Ridge, Illinois; that Hancock

THIS

WILLIAM W. GIBSON, JR.

PLAINTIFF

v.

REORGANIZATION FINANCIAL CORPORATION,

Defendant - Respondent.

WILLIAM W. GIBSON, JR.

PLAINTIFF

v.

222 I.A. 684

THE COURT.

Plaintiff, William W. Gibson, Jr., brought suit against

the Reorganization Financial Corporation, defendant herein, to

recover a certain real estate commission claimed to have been

earned and due him as a result of the sale of a certain house and

lot known as the Turkey property located at 520 Rockland Avenue,

York City, Illinois. The cause was tried before the court without

a jury, resulting in a verdict in favor of Plaintiff for the sum

of \$30,000, from which this appeal is taken.

The evidence shows that the defendant, Reorganization

Financial Corporation is a Governmental agency, created, owned and

operated for the purpose of aiding banks whose assets are not readily

salable; that the property herein mentioned was one of the assets

of the Central National Trust Company, which bank went into the

hands of a receiver and the property therein became one of the

assets of said receiver, this in the year being in a certain

of the receiver, Guy L. Rockefeller.

The evidence further shows that the defendant, who had

evidently advanced some money to aid said receiver bank, was

contracting to sell said property for the sum of \$7,500.00, less in

February, 1935, the sum of \$1,000.00 was lacking for a bank to

purchase and sell upon Plaintiff's direction, a licensed real estate

broker; that Plaintiff showed evidence, among other things, that

plaintiff at 520 Rockland Avenue, York City, Illinois; that defendant

authorized Cleveland to tell the defendant that he, Cleveland, would pay from \$6,000.00 to \$6,500.00 for the premises, whereupon the plaintiff Cleveland called upon the defendant Reconstruction Finance Corporation and told them he would offer \$6,500.00 for the premises, being the price stipulated by Hancock; that a Mr. Brattleleaf, whose title was "Examiner" in the office of the defendant corporation told him that the price was \$7,500.00.

The evidence further shows that no further negotiations took place between the defendant and the plaintiff until some time later; when the property was sold by the defendant to Mr. Hancock for \$7,000.00, Hancock having been brought to defendant's office by one of the defendant's rent collectors; that when the offer of \$6,500.00 was made by the plaintiff he did not disclose the name of Hancock to the defendant.

The evidence further shows that the property was not listed with the plaintiff by the defendant, nor was the plaintiff directly hired by the defendant as a real estate broker.

Plaintiff contends that some 6 or 7 years prior to this transaction the property was listed with him by the Central Republic Bank and Trust Company, the prior owner, but no details regarding said listing as to terms, or as to whether plaintiff was to have the exclusive agency, appear in the evidence before us.

Plaintiff further states that at the time Hancock came to his office it was for the purpose of having plaintiff help him find a home to purchase and that is why he, the plaintiff, called at the office of the defendant corporation and offered the figures submitted by Hancock as the price he was willing to pay for a home; that he submitted other property to Hancock for consideration which he also endeavored to have him purchase.

Defendant contends that it never listed with plaintiff

subscribed elsewhere in will the defendant had no, defendant, would pay him \$1,000.00 for the property, defendant the plaintiff elsewhere called upon the defendant in defendant's office and told them he would offer \$1,000.00 for the property, which the wife advised by husband; that a Mr. testified, whose title was "trustee" in the office of the defendant corporation told him that the price was \$7,000.00.

The evidence further shows that no further negotiations took place between the defendant and the plaintiff until some time later, when the property was sold by the defendant to Mr. Hancock for \$7,000.00, Hancock having been brought to defendant's office by one of the defendant's sons; and that the price of \$7,000.00 was made by the plaintiff as his net proceeds the same as Hancock to the defendant.

The evidence further shows that the property was not listed with the plaintiff by the defendant, nor was the plaintiff directly hired by the defendant as a real estate broker.

Plaintiff contends that some 5 or 7 years prior to this transaction the property was listed with him by the General Republic Bank and Trust Company, the price being, was no details regarding said listing as to terms, or as to whether plaintiff was to have the exclusive agency, appear in the evidence before us.

Plaintiff further states that at the time Hancock came to his office it was for the purpose of having plaintiff sell him land as shown to Hancock and that in fact, the plaintiff, called at the office of the defendant corporation and offered the property submitted by Hancock as the price he was willing to pay for a house; that he advised every property he owned for consideration which he also intended to have his purchase.

Defendant contends that it never placed this property

the property involved for sale and that defendant made no contract employing plaintiff as a broker; that the people with whom plaintiff dealt had no authority to make such a contract for defendant and, even if such a contract had been made, it was abandoned by plaintiff and, consequently, he is not entitled to any commission.

The evidence further shows that nothing further was done by plaintiff toward consummating the sale of said property to Hancock or to anyone else and that his claim first arose after the property had been sold, he having been informed of its sale by a tenant who lived in the building who had been notified to move; that plaintiff thereupon wrote a letter to the defendant corporation claiming a commission but he was informed by said corporation that inasmuch as he had not represented himself to be the agent entitled to a commission, it could not now entertain his claim as the property had been sold without knowledge of his claim; that Brattle and Vincent, representing the defendant, had no authority to pay any commissions unless authorized by their superiors in Washington.

From the evidence before us it is quite difficult to determine upon what theory this case was tried. Apparently it is plaintiff's contention that all that is necessary to constitute a claim for commissions as an agent is that if the prior owner lists a certain piece of real estate, any subsequent seller cannot safely sell the property without being liable for a commission on said sale notwithstanding the fact that the owner has received no notice to that effect nor has any knowledge that said brokerage commission was to be claimed.

The rule regarding the employment of real estate brokers is the same as the rule with reference to the employment of any other employee, and that is that to entitle them to commission there must first be evidence of such employment. The mere fact that a real estate agent was instrumental in finding a purchaser who afterwards purchased

the property involved for sale and that defendant made no statement
regarding plaintiff as a broker; that the parties who were claim-
ing title had no authority to make such a statement for defendant
and, even if such a statement had been made, it was corrected by
plaintiff and, consequently, he is not entitled to any commission.
The witness further shows that nothing further was done
by plaintiff beyond executing the sale of said property to defendant
or to anyone else and that his office never after the property
had been sold, he having been informed of the sale by a person who
lived in the building and had been notified by him; that plaintiff
thereupon wrote a letter to the defendant concerning the claim
commission but he was informed by said person that defendant
he had not returned himself as an agent entitled to a
commission, it could not now maintain its claim on the property and
then said without knowledge of his claim; that plaintiff and witness,
representing the defendant, had no authority to pay any commission
unless authorized by their superiors in Washington.
From the evidence before us it is quite difficult to
determine upon what theory this case was tried. Apparently it is
plaintiff's contention that all that is necessary to secure a
claim for commission as an agent is that at the time when said
a certain class of real estate, any subsequent action cannot legally
sell the property without being liable for a commission to said class
notwithstanding the fact that the owner has received no notice or
that agent has no knowledge of said prospective commission
to be claimed.
The rule regarding the payment of real estate brokers is
the same as the rule with reference to the employment of any other
employee, and that is that in order to obtain a commission there must
first be evidence of such employment. The rule that a real estate
agent can independently in finding a purchaser who afterwards purchases

the property, does not entitle the agent to a commission unless he was able to show that he was employed to find a purchaser.

In this case the evidence shows that Hancock, the purchaser, went to the office of Cleveland and engaged Cleveland to help find him a home and made an offer which Cleveland, on behalf of Hancock, communicated to some one in the defendant's office. Up to that time Cleveland was working on behalf of Hancock and, upon the refusal of the offer of Hancock which was made through Cleveland, plaintiff apparently abandoned any effort to get the parties together relative to selling the real estate herein involved.

In Wilson v. Mason, 158 Ill. 304, 309, the court said:

"The duty of a broker, who is employed to sell real estate, is to find and produce to the vendor a purchaser, who is ready, willing and able to complete the purchase as proposed. This he must do before he is entitled to any commissions. If the vendor rejects the purchaser so produced, the broker is bound to show that such purchaser was willing, ready and able to perform the contract according to the proposed terms."

Even assuming that the plaintiff was employed by defendant - a fact which is not disclosed by the evidence before us - it is quite apparent the plaintiff did nothing to consummate the sale and made no efforts beyond telephoning the offer made on behalf of Hancock.

The judgment entered in the Municipal Court is clearly against the manifest weight of the evidence and is, therefore, reversed.

JUDGMENT REVERSED.

HEBEL, P.J. AND HALL, J. CONCUR.

the property, does not entitle the owner to a permanent unless he
was able to show that he was entitled to that property.
In this case the evidence shows that defendant, who purchased
went to the office of defendant and sought defendant to help him
him a home and made an offer which defendant, on behalf of himself,
communicated to some one in the defendant's office. On the first
time defendant was working on behalf of himself and, upon the
return of the offer of defendant which was made through defendant,
defendant apparently abandoned any effort to get the parties together
relative to selling the real estate herein involved.
It is alleged that, on or about May 1, 1932, the board said:

"The body of a broker, who is engaged to sell real
estate, is to find and procure to the vendor a purchaser,
who is ready, willing and able to purchase the property
as proposed. This he must do before he is entitled to any
commission. If the vendor rejects the purchase or pro-
posed, the broker is bound to show that such purchaser was
willing, ready and able to purchase the property according
to the proposed terms."

Even assuming that the plaintiff was engaged by defendant -
a fact which is not disclosed by the evidence before us - it is
quite apparent the plaintiff did nothing to consummate the sale and
made no effort beyond telephoning the offer made on behalf of
Hannock.

The judgment entered in the plaintiff's favor is clearly
against the weight of the evidence and is, therefore,
reversed.
REVEREND JUSTICE.

HONORABLE J. J. HALL, J. JUDGE.

39285

LOUIS P. O'CONNELL,

Appellant,

v.

ROY O. WEST and PERCY B. ECKHART,
Co-partners, doing business as
WEST AND ECKHART,

Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

292 I.A. 634²

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF
THE COURT.

Plaintiff brings this appeal from a judgment entered in the Superior Court on an instructed verdict in favor of defendants.

The suit was brought to recover fees for services alleged to have been rendered and results obtained by plaintiff, a practicing attorney, in securing a reduction of \$189,165.00 in taxes levied against the Stevens Hotel Company on several pieces of property on which the hotel stands and the valuation of the improvements thereon. The pleadings consisted of the declaration, which contained two counts, a bill of particulars and amendment thereto and the plea of the general issue on behalf of the defendants.

The first count alleges that the defendants West and Eckhart are attorneys and are indebted to the plaintiff in the sum of \$37,500.00, for work performed by him in preparing, filing and in the trial of a certain tax objection pending in the County Court of Cook County, Illinois, concerning the reduction of general real estate taxes levied against the Stevens Hotel Corporation for the year 1927, upon the defendants' retainer and at their request, for fees due and payable to the plaintiff, and in consideration thereof defendants agreed to pay plaintiff for such services upon demand.

The second count follows the language of the first count and alleges in substance that the defendants are indebted to plaintiff in the sum of \$37,500.00; that defendants promised to pay plaintiff

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"so much money as he thereafter reasonably deserved to have of defendants, and when they, the defendants should be thereafter requested."

Thereafter the defendants made two motions for a bill of particulars, the contents of which the plaintiff has not seen fit to abstract.

In a supplemental bill of particulars is stated the following:

"Plaintiff sues on an express oral contract of employment entered into on to wit: the 23rd of April, 1928, with the defendants herein thru their duly authorized agent, said compensation to be contingent upon the amount of the reduction obtained in said taxes under the aforesaid objection, namely, a sum equal to one-third of the reduction so obtained."

In plaintiff's brief on page 3, it is stated:

"It is only fair to this Court in presenting this statement, to call to its attention that prior to the filing of this suit a previous suit was commenced by this plaintiff to recover fees from the Stevens Hotel Company in which the present defendants were not parties and a verdict for \$37,500.00 was returned by the jury in favor of this plaintiff, and judgment entered thereon from which an appeal was prayed to the Appellate Court of this District, and which Court in reversing the judgment in its opinion stated:

'The weight of the evidence tends to show that West and Eckhart employed the plaintiff upon terms which are in dispute.' Opinion of Appellate Court, O'Connell v. Stevens Hotel Company - Appellate Court, First District, February 29th, 1932 in #35446.' * * *

Subsequently O'Connell commenced this action following the suggestion and finding of the Appellate Court as above set forth, against West and Eckhart, for to recover the fees to which he was entitled for the services rendered in securing the reduction of the taxes, said reduction amounting to in excess of \$159,000.00."

The evidence shows that the Crawford Company, Certified Public Accountants, was handling Stevens Hotel accounts and suggested to O'Connell that he get in touch with a Mr. Martin who was general counsel for the Stevens Hotel, in an endeavor to have a reduction made in the taxes levied against the Stevens Hotel Company, which taxes they considered excessive; that at this conversation O'Connell assured Mr. Martin that he could present legal objections to the assessments, which would secure the desired reduction and for securing such reduction he, O'Connell, would be entitled to one-half of the

...and when they, the respondents should be identified

Thereafter the defendant sent two letters to the plaintiff, the contents of which the plaintiff has not seen. The to

is suggested that the following be added to the following:

"I have been on my knees every day since I was born, and I shall continue to do so until I die." This is the prayer of a young girl who has been blind from birth.

[illegible][illegible][illegible]

On 10/10/50, the following information was received from the Bureau of the Census:

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Reference: See above, 10/11/50, 10/12/50, 10/13/50, 10/14/50, 10/15/50, 10/16/50, 10/17/50, 10/18/50, 10/19/50, 10/20/50, 10/21/50, 10/22/50, 10/23/50, 10/24/50, 10/25/50, 10/26/50, 10/27/50, 10/28/50, 10/29/50, 10/30/50, 10/31/50, 11/1/50, 11/2/50, 11/3/50, 11/4/50, 11/5/50, 11/6/50, 11/7/50, 11/8/50, 11/9/50, 11/10/50, 11/11/50, 11/12/50, 11/13/50, 11/14/50, 11/15/50, 11/16/50, 11/17/50, 11/18/50, 11/19/50, 11/20/50, 11/21/50, 11/22/50, 11/23/50, 11/24/50, 11/25/50, 11/26/50, 11/27/50, 11/28/50, 11/29/50, 11/30/50, 12/1/50, 12/2/50, 12/3/50, 12/4/50, 12/5/50, 12/6/50, 12/7/50, 12/8/50, 12/9/50, 12/10/50, 12/11/50, 12/12/50, 12/13/50, 12/14/50, 12/15/50, 12/16/50, 12/17/50, 12/18/50, 12/19/50, 12/20/50, 12/21/50, 12/22/50, 12/23/50, 12/24/50, 12/25/50, 12/26/50, 12/27/50, 12/28/50, 12/29/50, 12/30/50, 12/31/50, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498

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amount saved on each assessment; that after some discussion O'Connell said he would be willing to accept one-third of the amount he could save through a reduction of the taxes as his fee; that Martin told O'Connell that West and Eckhart were the attorneys for the Hotel and had theretofore secured a reduction in the valuation through the Board of Review, but that he would present O'Connell's plans to the directors and would advise O'Connell what the directors attitude would be with regard to accepting O'Connell's proposition; that later Martin telephoned O'Connell telling him to see West and Eckhart who were their special attorneys in handling tax matters before the Board of Review, that Martin did not want to go over their heads in employing him, and directed O'Connell "to go over to their office in the morning regarding his employment and to see West or Hassell. Although the matter is already settled, and I told them what your charges were, I would like to have their (West and Eckhart's) O.K. before you proceed."

The evidence further shows that thereafter O'Connell went to the office of West and Eckhart, related the conversation he had had with Martin and that Martin wanted the O.K. of West and Eckhart before O'Connell took steps to handle the objections for them; that at that time O'Connell talked with a Mr. Hassell as West was not in, and that Hassell stated that he did not see where O'Connell could save a cent; that his firm had been before the Board of Review and that they had saved all the money that could be saved, but that if he wanted to O'Connell could go ahead on his own responsibility.

The evidence further shows that thereafter O'Connell went to the offices of West and Eckhart and saw Hassell and told him that it would aid in securing the reduction, and save penalties accruing if a payment be made of about \$269,000.00 on account of said taxes; that Hassell made arrangements for this payment and the Stevens Hotel Company paid this amount to the then county treasurer to avoid the penalties; that thereafter objections were filed in court under the

...on my own responsibility; and after some discussion O'Connell
said he would be willing to accept anything of the kind he would
give through a resolution of the House on his part that would take
O'Connell out of the way and thereby give the majority for the bill and
had therefore passed a resolution in the following terms: the
House of Representatives, that they would present O'Connell's name to the
Speaker and would advise O'Connell that the majority will
would be with regard to accepting O'Connell's responsibility that later
Martin O'Connell told him to get out and return and
that they would accept his responsibility in handling the matter before the House
of Representatives, that Martin had not come to the point where he was in
the bill, and O'Connell had no way to make things in the
morning regarding his employment and in the way of O'Connell. Although
the matter is already settled, and I told him that they would accept
I would like to have them (both the majority) all before you

presented.

The witness further stated that O'Connell would be
the effect of that the witness, stated the conversation he had had
with Martin and that Martin asked the bill of the House and Martin before
O'Connell told him to get out and return; that he told
that O'Connell asked him to get out and return; that he told
O'Connell asked him to get out and return; that he told
that he told him that he would accept the House of Representatives and that they had
saved all the money that could be saved, but that it was not to
O'Connell would be asked on his own responsibility.

The witness further stated that O'Connell would be
the witness at that time and O'Connell and the witness said that he had
would and in covering the witness, and was examining accounts it
payment he said at about \$25,000.00 in account of said funds; that
O'Connell was responsible for the sale payment and the witness said
O'Connell said that account to the fact that O'Connell was not the
witness; that O'Connell's statements were filed in order under the

name of West and Eckhart, to which objections were added Mr. O'Connell's name on the outside wrapper of the objections.

The evidence further shows that when the case was called for trial both O'Connell and Hassell appeared before the court and produced considerable evidence and the ultimate result was a saving in the amount paid for taxes by the Hotel Company, on whose behalf they appeared, in the sum of upwards of \$175,000.00.

The evidence further shows that thereafter there was some correspondence between plaintiff and the defendants relative to the amount or share of the fee that O'Connell was to receive; that after some discussion between the parties as to the amount of fees that should be charged for services by both of them, on November 12, 1929, Mr. West, one of the defendants wrote a letter, an excerpt from which is as follows:

"You will recall that when you first came to our office seeking employment in this case, you agreed with Lieutenant Hassell to accept such fee for services as we, in our discretion, should give you. We believe that the total fee for you and ourselves should be less than one-half of the \$75,000 asked by you for yourself alone and that your share of a total fee of \$32,000 for example should not exceed \$5,000. If the total fee should be less than \$32,500, we would expect your share to be reduced proportionately. Such a fee for you would adequately and fairly compensate you for the time devoted by you to the case and for the value of the services you have rendered."

We think the above excerpt from the letter written by Mr. West and the inferences to be drawn therefrom, tend to prove an acknowledgment by the defendants that \$5,000.00 would be paid to plaintiff if the defendants received \$32,000.00, and that the defendants were willing to pay such sum upon the payment to them of the fees by the Stevens Hotel Company. We also think that ^{the} letter tends to establish a value as to plaintiff's services, based on defendant's estimate. The information concerning the payment of the fees by the Stevens Hotel Company and the amount thereof was in the possession of the defendants and we think the court should have required the defendants to put in their evidence if they so desired or have submitted the matter to the jury,

from 1944 and 1945, in which operations were held by the British.

They reported, in the sum of upwards of \$75,000.00, in the amount paid for taxes by the Mutual Company, on whose behalf produced corroborative evidence and the witness recalls and a hearing for trial with O'Donnell and Carroll regarding witness the court and The witness further about that time was then the witness

[illegible]

"The 'All Russia' that you first knew as not only
a national movement in this sense, you agreed with this
movement, but also for the purpose of the movement, the
movement, I believe that the fact that you had not
before would be the fact that the fact that you
the movement, and that your share of a total of 100,000
the movement is about 10,000. If the total is 100,000,
as you said 10,000, you would expect your share to be 10,000.
movement, the fact that you would not only be
movement, you are the one divided by you and the
the value of the movement you have completed."

[illegible]

instead of having instructed the jury for the defendants.

The evidence shows the employment of the plaintiff by the defendants to aid them in the matter of the reduction of the taxes levied on the Steven's Hotel property. The plaintiff having rendered the services, he is entitled to compensation for same, the amount and terms of which are in dispute. Therefore, as we have already stated the same should have been submitted to a jury for its consideration and determination.

Because of the error of the trial court in giving the instruction to the jury at the close of the plaintiff's evidence to find the issues for the defendants, and for the other reasons set forth in this opinion, the judgment of the Superior Court is reversed and the cause is remanded for a new trial. Other questions are raised in the briefs, but inasmuch as this cause must be retried, we do not at this time deem it necessary to discuss the other points which have been raised.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL, P.J. AND HALL, J. CONCUR.

Approved and sent with all honors and with the highest

The witness upon the subject of the complaint by the
Colombians to all times in the history of the Republic of the United
States on the subject of the complaint. The witness further
testifies that he is entitled to compensation for the same, and
amount and form of which are to be determined. Therefore, he is here
already stated the same should have been submitted to a jury for the
consideration and determination.

At this time it was necessary to discuss the other points which arise in the trial, but I have not time to do so, so I will not do so. I will only say that the other points which arise in the trial are of a technical nature, and I will not discuss them at length. I will only say that the other points which arise in the trial are of a technical nature, and I will not discuss them at length. I will only say that the other points which arise in the trial are of a technical nature, and I will not discuss them at length.

[illegible]

39325

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

HARRY GAHAGAN,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

292 I.A. 634³

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF
THE COURT.

Defendant Harry Gahagan brings this appeal from a judgment entered against him in the Municipal Court, on the charge of driving an automobile while intoxicated. The cause was tried before a judge and jury and a judgment was entered on the verdict of the jury finding defendant guilty and sentencing him to serve 30 days in the Cook County Jail and to pay a fine of \$200.00, together with costs of the suit.

Defendant contends that the original information filed was based on a statute which had been repealed; that on June 23, 1936, leave was granted the State to file an amended information, which was not filed until June 26, 1936; that the cause proceeded to trial on June 23rd and was concluded on June 26th; that consequently, the amended information was not before the court at the time of the trial; and that the court should have sustained defendant's motion in arrest of judgment.

The evidence shows that the state's attorney entered nolle prosequi to the reckless driving count contained in the information and defendant was tried on the charge of driving whilst intoxicated.

In considering the question as to whether or not the amended information was before the court at the time of the trial, the abstract shows that on June 23, 1936, the following proceedings were had;

"Now come the People by the state's attorney and the defendant as well in his own proper person as by counsel also comes, and thereupon the defendant moves the Court to quash amended information, which motion is denied."

In Mirkham v. The People, 170 Ill. 9, the court at page 12,

said:

"It appears that the indictment was returned into open court by the grand jury in a body, but the clerk failed to place his file-mark on the indictment at that time, and after verdict, on motion of the State's attorney, the court ordered the clerk to place his file-mark thereon at the date on which it was returned into open court as shown by the record, quod pro tunc, to which plaintiff in error objected. The indictment having been returned into open court by the grand jury in a body, which fact was shown by the record, it became a part of the records of the court at once, and the omission of the clerk to place his file-mark thereon did not affect its legality or destroy its character. The record shows the indictment to be a part of the records, and the defendant was in no wise prejudiced by allowing, and it was not erroneous to allow, the file-mark to be placed thereon."

We think the amended information was properly before the court and was considered by it and the objection at this time is not well taken.

Defendant also contends that the verdict is against the manifest weight of the evidence and that the evidence is not sufficient to sustain the charge alleged in the amended information. No abstract of the testimony has been submitted to us. Under the law in considering the charges contained in the amended information, and in the absence of the testimony taken at the time of the trial, we must presume there was sufficient evidence to sustain the verdict of the jury.

For the reasons herein given the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND HALL, J. CONCUR.

"The House has heard the testimony of the witnesses and the testimony of the witnesses will be in the hands of the committee and the committee will report to the House on the 15th of the month."

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

348

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...we find the needed information and properly believe the

386 J. E. E.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

10-10-68

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For information add the following address: *Journal of the American Medical Association*, 535 North Dearborn Street, Chicago, Ill. 60610.

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39358

EUGENIA PIKORA,

Appellee,

v.

PILGRIM NATIONAL LIFE INSURANCE
COMPANY, a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

292 I.A. 634⁴

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF
THE COURT.

The plaintiff Eugenia Pikora, brought suit to recover on a certain insurance policy dated May 27, 1933, issued by the Sterling Life & Casualty Insurance Company on the life of Paul Gill who died September 27, 1934, plaintiff having been named as beneficiary in said policy. The Sterling Life & Casualty Insurance Company, was afterwards taken over by the defendant Pilgrim National Life Insurance Company, a corporation, the latter assuming all the liability on the policies of the Sterling Life & Casualty Insurance Company. The cause was tried before the court without a jury on an ex parte hearing which resulted in a finding against the defendant Pilgrim National Life Insurance Company, and plaintiff's damages were assessed at the sum of \$550.00, from which judgment defendant appeals.

The evidence shows that the plaintiff Eugenia Pikora was a sister of the insured and was designated as the sole beneficiary and brought suit to recover as such; that when the case was reached for call it was set for October 5, 1936; that the defendant or its counsel did not appear and the court thereupon continued the case until the 6th day of October, 1936, and directed counsel for plaintiff to serve a written notice upon the attorney for defendant that the cause had been set for trial on said day and that upon the defendant's failure to appear, the plaintiff would prove up her case and take a default judgment; that said notice was duly served upon the attorney

AMERICAN NATIONAL LIFE INSURANCE COMPANY, a corporation,

Plaintiff,

v.

JOHN A. BULLOCK, Defendant.

Appealed.

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2021.A.634

JOHN A. BULLOCK, Plaintiff, vs. AMERICAN NATIONAL LIFE INSURANCE COMPANY, Defendant.

THE COURT,

The Plaintiff's motion for summary judgment is hereby denied.

A motion for summary judgment is hereby denied.

Summary judgment is hereby denied.

Summary judgment is hereby denied.

Summary judgment is hereby denied.

Summary judgment is hereby denied.

Summary judgment is hereby denied.

Summary judgment is hereby denied.

Summary judgment is hereby denied.

Summary judgment is hereby denied.

Summary judgment is hereby denied.

Summary judgment is hereby denied.

Summary judgment is hereby denied.

Summary judgment is hereby denied.

Summary judgment is hereby denied.

Summary judgment is hereby denied.

Summary judgment is hereby denied.

Summary judgment is hereby denied.

Summary judgment is hereby denied.

Summary judgment is hereby denied.

Summary judgment is hereby denied.

Summary judgment is hereby denied.

Summary judgment is hereby denied.

for defendant according to the directions of the judge and the rules of court.

The evidence further shows that when the cause came on for trial on October 6, 1936, the attorney for the plaintiff exhibited to the court a receipted original of the hereinbefore described notice and, no one appearing for the defendant, the plaintiff requested the court to enter an order waiving the jury and plaintiff then and there proved up her case by evidence heard in open court; that the court upon such evidence found the issues for the plaintiff and entered judgment for \$550.00 and costs.

The evidence further shows that on October 8, 1936, ^{counsel for} the defendant evidently learning of such judgment, served a notice and a copy of a petition upon the plaintiff, and moved the court to set aside and vacate said judgment for the reasons set out in said petition, which stated among other things that he was engaged elsewhere at the time and that he had been sick for six months. His affidavit shows that at the time of the hearing he was engaged in the police court in another cause.

The evidence further shows that thereupon the court continued the motion to vacate the judgment until October 21, 1936, and directed the defendant to bring in its witnesses and at that time stated that if a defense to the cause of action were really shown to exist, the court would vacate and set aside said judgment and give defendant a full opportunity to present such defense.

The evidence further shows that when the cause was reached for a hearing on the motion to vacate on October 21, 1936, the defendant appeared in open court by counsel but refused and failed to produce any witnesses or any evidence whatsoever in support of its said motion to vacate said judgment; that the court thereupon entered an order denying defendant's motion to vacate and set aside said judgment and ordered that said judgment stand.

for defendant's testimony in the absence of the judge and the
jury at court.

The witness further stated that when the court came on for
trial on October 11, 1935, the testimony for the plaintiff was
in the court a verified original of the deposition described
heretofore, and was read for the defendant, the plaintiff
requested the court to enter an order requiring the jury and plaintiff
then and there to read by witness name in open court;
that the court upon which witness read the order for the plaintiff
and entered judgment for \$100,000 and costs.

counsel for

The witness further stated that on October 6, 1935, the
defendant's attorney is making of such judgment, served a notice and
a copy of a petition with the plaintiff, and served the court to set
aside and vacate said judgment for the reasons set out in said
petition, which stated among other things that he was entitled to
where at the time and that he had been paid for his services. His
affidavit shows that at the time of the hearing he was engaged in
the police work in another town.

The witness further stated that testimony the court was
found the motion to vacate the judgment until October 11, 1935, and
directed the defendant to bring in his affidavit and at that time
at that time it was ordered to him to bring in his affidavit and
to state, the court would vacate and set aside said judgment and
give defendant a full opportunity to present his defense.

The witness further stated that when the court was present
for a hearing on the motion to vacate on October 11, 1935, the
defendant appeared in open court by counsel but refused and failed to
produce any evidence or any witness whatever in support of his
said motion to vacate said judgment; that the court thereupon entered
an order denying defendant's motion to vacate and set aside said
judgment and ordered that said judgment stand.

In this court the appellant-defendant attempts to argue its case on the original pleadings filed, apparently ignoring the fact that a verdict and judgment has been entered. While courts are ever inclined to grant litigants an opportunity to be heard, still the burden is upon parties to protect their interests by the exercise of reasonable diligence.

Courts may exercise discretion in vacating judgments that have been entered ex parte and where it appears as in this case, that a defendant has had an opportunity to have his day in court and neglects to avail himself of that opportunity, he should not expect that the trial judge could do other than was done in the instant case. In the case before us the trial judge gave the defendant ample opportunity to be heard.

Therefore, no reason having been given as to why the judgment should be vacated, we are of the opinion that the trial judge did right in sustaining the judgment entered on October 6, 1936.

For the reasons herein given the judgment of the Municipal Court is hereby affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND HALL, J. CONCUR.

It is not the purpose of this report to discuss the merits of the various proposals, but to point out that the proposals are not mutually exclusive and that the Commission is not in a position to recommend any one of them. The Commission is of the opinion that the most desirable solution is to have a system of public ownership of the railroads, with the government acting as the owner and the public as the operator. This system would have the advantage of being able to raise the necessary funds by issuing bonds, and it would be able to operate the railroads in the most efficient manner possible. The Commission is of the opinion that this system is the most desirable one, and it is recommending it to the Congress.

There is no specific allegation in the above statement that
have been asserted in writing and there is no mention of its date.
That a defendant has had an opportunity to meet his day in court and
negotiate to settle himself at that opportunity, he should not expect
that the trial judge would do other than was done in the instant case.
In the case before us the trial judge gave the relevant words
voluntarily to be heard.

[illegible]

• ENVIRONMENTAL MONITORING

THE CITY OF NEW YORK

39373

THE PONTIAC PRESS, INC., a corporation,

APPEAL FROM

Appellant,

v.

MUNICIPAL COURT

JACOB D. ALLEN,

Appellee.

OF CHICAGO.

292 I.A. 635

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

The Pontiac Press, Inc., brought suit in the Municipal Court to recover on a promissory note of defendant Jacob Allen. The cause was tried before the court without a jury which resulted in a judgment in favor of defendant, from which judgment plaintiff brings this appeal.

Plaintiff contends that defendant's principal note for \$509.50, was given in payment of a claim against the defendant for printing sold and delivered by plaintiff to the defendant at his request and that thereafter defendant paid \$100 on account, leaving a balance of \$409.50 still due and owing.

Defendant has not appeared or filed briefs in this court. His contention as shown by the pleadings in the trial court appears to be that he made the note but there was no consideration therefor; that he gave it as an accommodation to plaintiff so as to use defendant's name and credit for the purpose of obtaining a loan to aid plaintiff; ~~xxxxxxx~~ that the plaintiff printed some cards for a political campaign wherein the defendant was a candidate; that he gave plaintiff \$100 which plaintiff credited on the note.

Plaintiff's exhibit 3 is a letter written by defendant dated August 24, 1933, and addressed to Mr. Nate Feldt, Pontiac Press, Inc., and contains the following:

"I explained my circumstances to you at the time I was unable to pay the note I gave you. It was my understanding at the time you printed my cards that they were to be a donation. I do not recall that I gathered the impression that you were

personally making such a contribution but I did have a very definite impression that from some source amongst my friends my campaign cards were to be furnished. Later when I understood you had no means of reimbursing yourself I readily assumed the obligation and gave you the note. Certainly, it is no fault of yours that I formed an erroneous impression in the matter. At the time I gave you the note I had a definite assurance that I would have available to me a considerable sum of money. These commitments failed me.

I told you at the time I was unable to meet my obligation that your bill would be the first I would pay when I was able to. I regret this matter not because I owe you money which some day I will be able to pay, but because these circumstances may cause me to lose your friendship. I want you to know that I propose to redeem my pledge to you at the earliest possible moment and that any time that I can make even a partial payment, I will do so.

I have no objections to your placing your bill in the hands of an attorney for collection. I can only say to your attorney what I have said in this letter to you. I have no assets or income and the only action you can take would be to record a judgment against me which will not affect my ability, obligation or willingness to pay."

Plaintiff denied the allegation of the defendant that the note was merely an accommodation note and from the above letter and the payment of \$100.00, it is quite evident that it was not. It clearly appears that the defendant is liable and when on the witness stand he did not contend otherwise, but merely contented himself with saying that he would pay as soon as he could.

The evidence clearly preponderates in favor of the plaintiff and the trial court erred in finding otherwise. Inasmuch as all the evidence clearly proves the liability of the defendant there will be no need of remanding the cause. The judgment of the Municipal Court will, therefore, be reversed and judgment entered here for the sum of \$409.50, plus accrued interest at six per cent per annum.

JUDGMENT REVERSED AND JUDGMENT HERE FOR
\$409.50, plus accrued interest at
six per cent per annum.

HEBEL, P.J. AND HALL, J. CONCUR.

39528

JOSEPH CASTLE,
Appellee,

vs.

RIVERVIEW PARK COMPANY, a
corporation,
Appellant.

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

292 I.A. 635²

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries claimed to have been sustained by being thrown from a car while riding on a circular railway called the "Pippin" in defendant's amusement park. There was a jury trial and a verdict and judgment in plaintiff's favor for \$20,000 and defendant appeals.

The record discloses that on August 7, 1934, about 10:30 p. m., plaintiff, then about 21 years old, and another young man about 18 years of age, took a ride as passengers on defendant's scenic railway. There were three cars in the train, four seats to each car, and two persons in each seat. The railway was circular in form and about 2800 feet in length, with 7 or 8 hills, and several curves. The train was hauled to the top of the first hill with a sprocket chain by motor; it was then released and then ran by gravity and its own momentum around the structure until it came back to a loading platform where it was stopped. It takes about two minutes for a train to complete the circuit. When the train on which plaintiff was riding was more than half way around the track plaintiff, who was riding in the front seat of the first car, was thrown from the car and severely injured.

Plaintiff's complaint was in six counts. The first charged defendant with general negligence in failing to operate the train with the highest degree of care consistent with its mode of opera-

JOSEPH CLARK,

Defendant,

vs.

RIVERVIEW RAILROAD,
a corporation.

Plaintiff.

IN SENATE,

OF THE STATE OF NEW YORK.

J. A. HARRISON, JUDGE OF THE COURT,
REPORTS THE DECISION OF THE COURT.

The plaintiff brought an action against the defendant to recover

damages for personal injuries alleged to have been sustained by

being thrown from a car while riding on a passenger railway owned

by the defendant, the "Albany" in defendant's passenger car. There was a jury

trial and a verdict and judgment in plaintiff's favor for \$50,000

and defendant appeals.

The record discloses that on August 7, 1904, about 10:30

p. m., plaintiff, then about 21 years old, and another female and

about 18 years of age, took a ride on passenger car on defendant's

passenger railway. There were three cars in the train, the first being an

engine car, and two persons in each car. The railway was electric

in form and about 2000 feet in length, with 7 or 8 miles, and several

curves. The train was moving in the top of the first car with a

speed of about 10 miles per hour; it was then raining and there was

gravity and the two women were standing until it came

back to a standing position where it was stopped. It took about

two minutes for a train to complete the circuit. When the train was

which plaintiff was riding was about half way around the track

plaintiff, who was riding in the front seat of the first car, was

thrown from the car and severely injured.

Plaintiff's complaint was in six counts. The first charged

defendant with general negligence in failing to operate the train

with the highest degree of care consistent with the mode of opera-

3882

tion, as a result of which plaintiff was thrown from the seat and injured. The second count charged that by reason of the negligent management of the train the car in which plaintiff was riding suddenly and violently lurched and jerked and plaintiff was thrown out and injured. The third count charged that defendant failed to keep the track on which the trains ran clean; that it was covered with sand, debris and other foreign material and as a result of this negligence, while the train was going down hill at great speed it was caused suddenly to slacken or stop and plaintiff was thrown from his seat. The fourth count charged the failure of defendant to securely fasten plaintiff in his seat so as to prevent him from being thrown out of the car. In the fifth count defendant was charged with failure to provide guards on the sides to protect passengers; and the sixth count charged that the track on which the train ran was worn and defective and had not been properly inspected by defendant, as a result of which the car lurched and jerked, throwing plaintiff from his seat. At the close of plaintiff's case, on motion of defendant the court dismissed counts 3, 4, 5 and 6. Defendant then put in its evidence and the case went to the jury on the first and second counts only.

Both parties agree that the law is that in the operation of the train in question defendant is held to the same degree of responsibility in the management of the train as is a common carrier. O'Callaghan v. Dellwood Park, 242 Ill. 336.

It seems to be agreed that the 24 seats of the train in question were occupied at the time plaintiff was injured. Six eyewitnesses who were in the car in which plaintiff was riding - plaintiff, the young man with him (both of whom were riding in the front seat of the first car) and two other passengers - testified in plaintiff's behalf, all to the effect that when the train started down one of the hills more than half way around the circular track,

tion, as a result of which plaintiff was thrown from the train and injured. The second count charged that by reason of the negligent management of the train the defendant was liable for the injury to plaintiff. The third count charged that defendant failed to keep the track on which the train ran clear; that it was covered with coal, debris and other foreign material and as a result of this negligence, while the train was going down hill at great speed it was caused suddenly to stop and plaintiff was thrown from his seat. The fourth count charged the failure of defendant to securely fasten plaintiff in his seat so as to prevent him from being thrown out of the car. In the fifth count defendant was charged with failure to provide guards on the sides to protect passengers; and the sixth count charged that the train on which the train ran was worn and defective and had not been properly inspected by defendant, as a result of which the car in which plaintiff was riding was damaged. At the time of plaintiff's case, on motion of defendant the court assessed counts 1, 2, 3 and 4. Defendant then put in its evidence and the case went to the jury on the first and second counts only.

Both parties agree that the law is that in the operation of the train the question between it and the owner is one of responsibility in the management of the train as is a common carrier.

O'Callaghan v. Bellows Falls, 222 Ill. 384.

It seems to me that both the case of the train in question were occupied at the time plaintiff was injured, six witnesses were in the car in which plaintiff was riding - plaintiff, the young man with him (both of whom were riding in the front seat of the first car) and two other passengers - traveling in plaintiff's behalf, all to the effect that when the train started down one of the hills were there half a mile or so from the other train,

there was an unusual and severe jerk backward and forward; that plaintiff was sitting down, had hold of the iron bar on the side with his left hand, and another iron bar in front with his right hand, and that the jerk caused plaintiff to be thrown in a somersault over the front bar; but one of these witnesses, Mrs. David, testified on cross-examination that she had ridden the trains on this scenic railway many times, - "Although I said it was a jerk, it is always jerky. Being raised out of your seat is the customary motion of that ride. When you come down a steep incline you don't raise out of your seat if you have your feet in the right place. It is part of the thrill you get out of the ride." As stated, two of the passengers in the car, Shayman and Bilotta, were called by defendant. The substance of their testimony was that there was no unusual jerk of the car at the time plaintiff was thrown or fell from it. Shayman said, "The motion of the car was the way it always goes. Prior to this accident I didn't notice any violent jerk." They both saw plaintiff somersault over the front^{bar}/of the car and fall to the ground. Their testimony was considerably weakened on cross-examination.

The evidence further shows that when the train came to its destination at the loading platform, after plaintiff was injured, Henry Schure, plaintiff's companion in the seat with him, and some employees of defendant went in search of plaintiff and found him underneath the structure and he was taken to a hospital where he received medical and surgical attention. Some of these witnesses testified that at that time, upon inquiring of Schure as to how plaintiff came to fall, he replied that plaintiff was "jockeying up and down" in the seat of the car, bobbing up and down; "I told him to sit down but he would not do it." Schure denied making such statements. The evidence further shows that when the train reached the loading platform just after the accident it was taken

there was an unusual and heavy dark pressure and tension; that
 Plaintiff was sitting down, and while he was there he saw
 with his left hand, and another man was in front with his right
 hand, and that the man caused Plaintiff to be driven in a narrow
 aisle over the front bar; but one of these witnesses, Mr. Davis,
 testified on cross-examination that he had ridden the train and
 this would naturally vary time, - "Although I said it was a fact,
 it is always true. Being raised out of your seat is the ordinary
 motion of this ride. When you come down a steep incline you don't
 raise out of your seat it you have your feet in the right place.
 It is part of the thrill you get out of the ride." As stated, two
 of the passengers in the car, Graham and Blythe, were called by
 defendant. The substance of their testimony was that there was no
 unusual jerk of the car at the time Plaintiff was thrown or fall
 from it. Graham said, "The motion of the car was the way it always
 is. Prior to this accident I didn't notice any unusual jerk."
 They both saw Plaintiff ^{her} ~~himself~~ over the front of the car and
 fall to the ground. Their testimony was consistently sustained on
 cross-examination.

The evidence further shows that when the train came to its
 destination at the landing platform, after Plaintiff was injured,
 many persons, Plaintiff's companion in the seat next to him, and some
 employees of defendant went in search of Plaintiff and found him
 underneath the stove and he was taken to a hospital where he
 received medical and surgical attention. None of these witnesses
 testified that at that time, upon finding of himself as he now
 Plaintiff came to fall, he noticed that Plaintiff was "tossing
 up and down" in the seat of the car, looking up and down; or said
 him to sit down but he would not do it." As stated earlier
 and elsewhere. The evidence further shows that when the train
 reached the landing platform just after the accident it was then

out of service. Defendant operated a similar train which continued after the accident until closing time. Further evidence was offered by defendant, that on the day following the accident the track and the car in question were examined by some of the city officials whose duty it is to inspect scenic railways and similar devices, and the track and car were also inspected by some of defendant's employees, but nothing was found to be out of order, and that the train and car in question were on that day again put into service.

Counsel for plaintiff says in this brief, "There was no contributory negligence on the part of plaintiff, and the defendant is held to the highest degree of care in the construction, maintenance and operation of its equipment. Defendant admits that it is a common carrier of passengers for hire. Therefore the doctrine of res ipsa loquitur applies;" and that the evidence, "shows that the cars and the superstructure on which the cars ran were fourteen years old and of wooden construction; that the equipment was not inspected prior to the accident; that the cars had no doors to keep passengers from falling out; that there were no straps or devices furnished to hold passengers in their seats; that there was a jerk or lurch or series of jerks or lurches, of a severe, unusual and unexpected nature, which threw plaintiff out of the car; that, as one witness expressed it, the jerks seemed as if something had not caught underneath; that one of defendant's employees found a defect in the track at the place of the jerks." The difficulty with the statement that the cars "had no doors to keep passengers from falling out" and that there were "no straps or devices furnished to hold passengers in their seats" is that the counts of the complaint which might warrant such proof were eliminated by the court at the close of plaintiff's case, and no complaint is made by plaintiff to the ruling. As we read the evidence, the case was not tried on the theory that defendant should have furnished doors, straps or

out of service. Defendant operated a similar train which continued after the accident until closing time. Further evidence was offered by defendant, that on the day following the accident the track and the car in question were examined by some of the city officials, whose duty it is to inspect electric railways and similar facilities, and the track and car were also inspected by some of defendant's employees, but nothing was found to be out of order, and that the train and car in question were on that day again put into service.

Counsel for plaintiff says in this brief, "There was no contributory negligence on the part of plaintiff, and the defendant is held to the highest degree of care in the operation, maintenance and operation of its equipment. Defendant admits that it is a common carrier of passengers for hire. Therefore the doctrine of res ipsa loquitur applies;" and that the evidence, "shows that the car and the superstructure on which the cars run were between years old and of wooden construction; that the equipment was not inspected prior to the accident; that the cars had no doors to keep passengers from falling out; that there were no straps or devices furnished to hold passengers in their seats; that there was a jerk or lurch or series of jerks or lurches, of a severe, unusual and unexpected nature, which threw plaintiff out of her seat; that, as was witness expressed it, the jerk seemed as if somebody had not caught underneath; that one of defendant's employees found a button in the track at the place of the jerk." The plaintiff also has a statement that the car "had no doors to keep passengers from falling out" and that there were "no straps or devices furnished to hold passengers in their seats" is that the nature of the complaint which might warrant such proof were allowed by the court at the close of plaintiff's case, and no complaint is made by plaintiff to the contrary. As we read the evidence, the case was not tried on the theory that defendant should have furnished doors, straps or

devices to prevent passengers from falling out or from being thrown out of the car. If that were the case a different situation would be presented. The question whether defendant (under the law that it use the highest degree of care - that degree of care required of a common carrier) would be required to furnish straps or devices to prevent passengers from being injured as in the instant case, is not before us. That question, we think, would require that evidence be adduced on the point, but there is none in the record. We think the verdict of the jury to the effect that because of a defective car or track there was an unusual jerk of the car is against the manifest weight of the evidence. Plaintiff relies on the O'Callaghan case, (242 Ill. 336.) In that case the passenger was thrown from a roller coaster somewhat similar to the one in question, the evidence showing that the car was suddenly jerked, as a result of which plaintiff was thrown out and injured. The court said that there "apparently was something on the track" which caused the car to be suddenly jerked, and that "It appears from the evidence that the rails upon which these cars ran were greasy from the oil and grease that fall from the cars, and that the bearings of the cars were frequently oiled." In the instant case we think the evidence fails to show there was anything wrong with the track or with the car; but in any event, the verdict on this question is against the manifest weight of the evidence.

Since there may be a retrial of this case, we think we ought to say that the cross-examination of the witness Bilotta by counsel for plaintiff, ought not be repeated on a new trial. The substance of questions put by counsel to this witness was as to whether, shortly after the accident, the witness had not in effect offered to give testimony favorable to plaintiff for a consideration. The witness denied making any such statement. We think it obvious that the questions were entirely proper provided that afterward plaintiff

devices to give at present, the first falling out of the train would
out of the car. It had been the same in the previous accident which
be presented. The question whether the car (under the law) had
it was the highest degree of care - that degree of care required of
a common carrier) would be required to furnish proper evidence to
prevent defendant from being injured as in the instant case, is
not before us. That question, we think, would require more evidence
be adduced on the point, but there is none in the record. We think
the verdict of the jury to the effect that because of a defective
car or track there was an unusual form of care to be required of
manifest weight of the evidence. Plaintiff relies on the
O'Connell case, (194 Ill. 328.) in that case the passenger was
thrown from a roller coaster because similar to the one in question,
the evidence showing that the car was suddenly jerked, as a result
of which plaintiff was thrown out and injured. The court said that
there "apparently was something on the track" which caused the car
to be suddenly jerked, and that "it resulted from the evidence that
the rails upon which these cars run were twenty feet and all and
crossed at right angles, and that the wheels of the cars
were frequently oil." In the instant case we think the evidence
tells us that there was something wrong with the track or with the
car; but in any event, the verdict on this question is against the
defendant.

There may be a refusal of this case, we think we ought
to say that the cross-examination of the witness should be allowed
for this case, and it not be regarded as a new trial. The substance
of questions put by counsel to this witness was as follows, nearly
all the questions, the witness did not in any way attempt to give
testimony favorable to plaintiff for a consideration. The witness
did not make any such statement. It seems to appear that the
questions were entirely proper provided that defendant himself

called a witness who would testify that Bilotta had made such statements. No such witness was called, and the questions and answers were therefore highly improper. A witness cannot be discredited by asking such questions unless proof is thereafter made that the witness had made such statements.

For the reasons stated the judgment of the Circuit court of Cook county is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely and Matchett, JJ., concur.

called a witness who would testify that after some time was
 statement. The only witness was called, and the questions and
 answers were favorable slightly improper. A witness could be
 discredited by asking such questions unless it is necessary
 made that the witness had made such statements.
 For the reasons stated the judgment of the Circuit Court
 of Cook County is reversed and the cause remanded.

REVEREND AND HONORABLE.

Respectfully and obediently, J. J. Conner.

39556

WIKTORIA BURZAK,
Appellant,

vs.

CITY OF CHICAGO, a Municipal
Corporation,
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

292 I.A. 635³

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries claimed to have been sustained through the negligence of defendant in failing to use reasonable care to keep a certain sidewalk in a reasonably safe condition, and that without negligence on her part she stepped into a hole in the sidewalk, fell and was severely injured.

While there is some confusion in the record, we think it appears that at the close of plaintiff's case the court reserved defendant's motion for a directed verdict in its favor. The case was then submitted to a jury and verdict was returned in plaintiff's favor for \$2500; afterward the court sustained defendant's motion and entered judgment in defendant's favor, notwithstanding the verdict. Plaintiff appeals.

The record discloses that plaintiff, a married woman, lived at 1411 North Rockwell street, Chicago; that about two o'clock in the afternoon of March 8, 1935, she walked south on Rockwell street and turned west on Division street, which was about two blocks south of where she lived, and did some shopping at a grocery store on Division street just west of Rockwell street; as she was returning home she walked on the sidewalk at the west side of Rockwell street, and claims she stepped in a hole in the sidewalk a short distance from Division street, was thrown, fell, and was severely injured.

One of the material allegations of the complaint was that

PLAINTIFF'S EXHIBIT,
Exhibit,
vs.
CITY OF BOSTON, a municipal
corporation,
Defendant.

IN SENATE,
JANUARY 10, 1905.

32555 I.A. 635

REPORT OF THE COMMISSIONER OF THE BOARD OF
HEALTH, IN RESPONSE TO A RESOLUTION OF THE SENATE,

RELATIVE TO THE QUESTION OF THE SANITATION OF THE CITY OF BOSTON.

Whereas the Board of Health, in its report of the 10th of January, 1905, has stated that it has been ascertained that the defendant, the City of Boston, has failed to keep a certain sidewalk in a reasonably safe condition, and that without negligence on her part she exposed into a hole in the sidewalk, fell and was severely injured. While there is some contention in the record, we think it appears that at the close of plaintiff's case the jury returned defendant's motion for a directed verdict in the favor. The case was then submitted to a jury and verdict was returned in plaintiff's favor for \$2500; afterwards the court sustained defendant's motion and entered judgment in defendant's favor, notwithstanding the verdict. Plaintiff appeals.

The record discloses that plaintiff, a married woman, lived at 111 North Russell street, Boston; that about the 4th of the afternoon of March 4, 1905, she walked across an sidewalk across and turned west on Division street, when she about two blocks south of where she lived, and did some shopping at a grocery store on Division street just west of Russell street; as she was returning home she walked on the sidewalk at the west side of Russell street and falling was exposed in a hole in the sidewalk a great distance from Division street, was thrown, fell, and was severely injured. One of the material allegations of the complaint was that

plaintiff, while in the exercise of due care, "stepped into and upon certain cracks, defects and holes" in the sidewalk, as a result of which she fell and was injured.

Defendant contends that the court was warranted in entering judgment in its favor, notwithstanding the verdict of the jury, because there was no proof to sustain the allegation just quoted, viz., that plaintiff had stepped into a hole in the sidewalk. While the evidence in this regard was not very well developed, we think it was sufficient to raise a question for the jury.

Plaintiff testified in her own behalf that she fell on the sidewalk - "I think there is hole in sidewalk, I did not see the hole because there was snow covering the hole." On cross-examination by counsel for defendant the record discloses:

"Q. Where did you fall? A. Across, in the sidewalk, there was a hole and I fall down. *** Q. Was it a very big hole that you stepped into? A. I can't tell you, I fall down and I don't know anything after I fall, *** Q. Did you see the hole before

you stepped into it? A. No, because the snow covered the hole." We think the court was not warranted in finding there was no evidence that plaintiff had stepped into a hole. The question was for the jury in the first instance, and if there was a verdict for plaintiff and the trial judge was of the opinion that the verdict was not sustained by a preponderance of the evidence, he should have set it aside and awarded a new trial. Libby, McNeill & Libby v. Cook, 222 Ill. 206. But counsel for defendant say that even if there were some holes or unevenness of the sidewalk in question, which caused plaintiff to fall, there would be no liability because a municipal corporation is not liable for such slight defects, and that the court was warranted in directing a verdict for this reason. In support of this counsel cite a number of authorities, including White v. City of Belleville, 284 Ill. App. 322, where a judgment

plaintiff, while in the exercise of her care, "stepped into and upon certain cracks, holes and holes" in the sidewalk, as a result of which she fell and was injured.

Defendant contends that the cracks and holes were not visible to plaintiff in the light, notwithstanding the verdict of the jury, because there was no proof to sustain the allegation that plaintiff, but defendant had stepped into a hole in the sidewalk. While the evidence in this regard was not very well developed, we think it was sufficient to raise a question for the jury.

Plaintiff testified in her own behalf that she fell on the sidewalk - "I fell down in a hole in the sidewalk, I did not see the hole because there was some darkness on it." In cross-examination by counsel for defendant the record disclosed:

"Q. Where did you fall? A. Across, in the sidewalk, there was a

hole and I fell down. ** A. There is a very big hole there.

stepped into? A. I can't tell you, I fell down and I can't

know anything after I fell. ** Q. Did you see the hole before

you stepped into it? A. No, because there was a very big hole.

We think the court was not warranted in finding there was no evidence to

show that plaintiff had stepped into a hole. The question was for

the jury in the first instance, and if there was a verdict for

plaintiff, and the trial judge was of the opinion that the verdict

was not sustained by a preponderance of the evidence, he should

have set it aside and awarded a new trial. City of New York v. Long, 222 Ill. 505. But assuming the defendant was that even if

there were some holes or depressions in the sidewalk in question,

which caused plaintiff to fall, there could be no liability because

a municipal corporation is not liable for such slight defects, and

that the defect was repaired in violation of a statute for this reason.

In support of this counsel cites a number of authorities, including

White v. City of Springfield, 224 Ill. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

rendered on the verdict of the jury in favor of plaintiff for injuries sustained by reason of a claimed defective sidewalk, was reversed. The difficulty with this authority is that the judgment of the Appellate court was reversed by the Supreme court (364 Ill. 577), where the court said the question was for the jury and remanded the cause to the Appellate court to consider further errors, if any, and either to affirm the judgment or reverse it and remand the cause for a new trial; and upon remandment to the Appellate court the judgment of the trial court was affirmed, 9 N. E. Rep. 2nd, 68.

The judgment of the Superior court of Cook county is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

McSurely and Matchett, JJ., concur.

39495

In Re: ESTATE OF SOLOMON MAZIE,
Deceased.

AGNES STEINHAUSER, FRANZ NELL,
and WILLI NELL, by J. COLBURN
HAMILTON, Attorney in Fact,
Appellees,

vs.

ANNE MAZIE, Administratrix,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

292 I.A. 635⁴

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

The Probate court entered an order finding, among other things, that a supplemental inventory was not filed within one year from the date of the issuance of letters of administration, vacated an order closing the estate and directed the administratrix to publish for claims and gave petitioners represented by J. Colburn Hamilton leave to file their claim; the administratrix appealed to the Circuit court where after a hearing that court on December 14, 1936, entered an order substantially affirming the orders of the Probate court, and the administratrix appeals to this court.

Did the administratrix, as petitioners say, knowingly fail to list certain assets in the decedent's estate, and intentionally lead petitioners not to file their claim on the ground that the estate had no assets to pay it?

Solomon Mazie died January 1, 1935; letters of administration were issued to Anne Mazie, administratrix, February 19th; inventory was filed September 24, 1935, showing a flat building subject to a mortgage of \$5000, cash amounting to \$633.82, and goods and chattels \$132. A supplemental inventory was filed February 19, 1936, alleging that the administratrix since the filing of the first inventory had come into possession of Treasury and United States bonds belonging

In No. 10,475 of District Court,
D.C.

AGNES ELLIOTT, Plaintiff,
vs.
WILLIAM HAMILTON, Defendant.

Administratrix,
vs.
Hamilton.

MR. JUSTICE BREWER delivered the opinion of the court.

The Probate Court entered an order of administration, among other things, that a special inventory was not filed with the court. Year from the date of the issuance of letters of administration, vacated an order closing the estate and directed the administratrix to prepare for claims and have petitioners represented by J. C. Hamilton leave to file their claim; the administratrix appeared in the District Court where after a hearing that court on December 14, 1932, entered an order substantially affirming the order of the Probate Court, and the administratrix appeals to this court. Did the administratrix, as petitioners say, knowingly fail to list certain assets in the decedent's estate, and intentionally lead petitioners not to file their claim on the ground that the estate had no assets to pay it?

Colson Estate filed January 1, 1932; letters of administration were issued to Agnes Elliot, administratrix, February 1932; inventory was filed September 12, 1932, showing a first mortgage payable to a mortgage of \$5000, cash amounting to \$615.00, and bonds and certain other assets. A supplemental inventory was filed February 12, 1933, alleging that the administratrix alone the filing of the first inventory had come into possession of Treasury and United States bonds belonging

to the decedent aggregating \$5000.

March 25, 1936, it was ordered that no claims having been filed, the estate be settled and the administratrix discharged.

September 30, 1936, a petition was filed in the Probate court by J. Colburn Hamilton, attorney in fact of Agnes Steinhauer, Franz Nell and Willi Nell, residents of Germany, asserting that they were the legal owners and holders of a trust deed securing a principal promissory note of \$5000, the payment of which was extended by agreement with the decedent and his wife on February 16, 1932, and that by the extension agreement the decedent personally obligated himself to pay the note; petitioner represented that he had examined the files and records in the estate and found the original inventory showing that the estate was insolvent, and for that reason did not file a claim on the note; that just prior to the expiration of the year of administration he again examined the records and files and found no additional assets inventoried; that he was led to believe and was informed by the attorney for the estate that there were no other assets and therefore no claim was filed on behalf of his principals; that he had just discovered that a supplemental inventory was filed and approved February 19, 1936, showing assets in the estate of \$6000; that no notice as required by statute was given as to the assets in the supplemental inventory and that he had no notice of the filing of the supplemental inventory and therefore did not file his claim; the petition alleges that the administratrix knew, when the first inventory was filed, of the assets which were set forth in the supplemental inventory. Petitioners asked that the order closing the estate be set aside, that they be allowed to file their claim, and for other relief.

The administratrix filed her answer asserting that the time for filing claims expired February 18, 1936, and that petitioners

to the record and regarding same.

March 25, 1932, it was ordered that no claim having been

filed, the estate be closed and the administrative proceedings

terminated. On March 25, 1932, a resolution was filed in the probate

court by J. Colburn Hamilton, attorney in fact of above estate,

Hammor, Frank Bell and Will Bell, residents of Kentucky, asserting

that they were the legal owners and heirs of a first class

securing a judicial proceeding now of record, the purpose of

which was extended by agreement with the executor and the will of

February 18, 1932, and that by the will of the executor the executor

personally obligated himself to pay the debt; Hamilton represented

that he had examined the files and records in the estate and found

the original inventory showing that the estate was insolvent, and

for that reason did not file a claim on the date; that just prior to

the expiration of the year of administration he again examined the

records and files and found no additional assets inventoried; that

he was led to believe and was informed by the attorney for the estate

that there were no other assets and therefore no claim was

filed on behalf of his principals; that he had just prior to that

a supplemental inventory was filed and approved February 19, 1932,

showing assets in the estate of \$5000; that no action be required

by estate was given as to the assets in the supplemental inventory

and that he had no notice of the filing of the supplemental inventory

and therefore did not file his claim; the petition alleges that the

administratrix, when the first inventory was filed, at the

assets which were set forth in the supplemental inventory. That

finders held that the order closing the estate is not valid, that

they be allowed to file their claim, and for other relief.

The administratrix filed her answer asserting that the time

for filing claims expired February 18, 1932, and that petitioners

having failed to file their claim within this time have no standing; that the estate was closed on March 25, 1936, and she was discharged as administratrix, and alleged that the Probate court had no further jurisdiction in the matter; she admitted that the decedent left a bank balance as stated in the petition and that the funds were invested in Treasury notes as shown in the supplemental inventory; that her attorney inadvertently omitted from the first inventory filed this bank account and Treasury bonds.

The administratrix asked the Probate court to correct its records so as to show that the supplemental inventory was filed February 18th instead of February 19, 1936, and it was so ordered. The petition filed by Hamilton asked that this order be vacated, which was done, and the Probate court found that the supplemental inventory was filed February 19, 1936. The Probate court entered all the orders requested in Hamilton's petition.

The record from the Circuit court shows that after the letters of administration were issued an examination was made of the safety deposit box of decedent on March 4, 1935, and an inventory of its contents made; that there were present at this time a representative of the inheritance tax office for Illinois, Anne Mazie, administratrix, L. Louis Karton, her attorney, and a representative of the Safety deposit company; the contents of the box were listed and showed, among other things, a balance in the savings account of decedent in the Northern Trust Company of over \$6000; there were also other items of assets.

March 18, 1935, administratrix withdrew from this savings account \$6538.52 and deposited it to her account as administratrix; March 28th she withdrew \$6086.86 from this account and on ^{the} following day the balance.

September 24, 1935, the administratrix filed her inventory in the estate purporting to list all of the assets; the inventory

having failed to file their claim within this time have no standing; that the estate was closed on March 22, 1935, and was distributed as administratively, and alleged that the estate should not be further jurisdiction in the matter; and alleged that the proceeds left in bank balance as stated in the petition and that the funds were invested in treasury notes as shown in the supplemental inventory; that her attorney inadvertently omitted from the first inventory filed this bank account and treasury notes.

The administratrix asked the Probate Court to correct the records so as to show that the supplemental inventory was filed February 12, instead of February 19, 1935, and it was so ordered. The petition filed by Hamilton asked that this order be vacated, which was done, and the Probate Court found that the supplemental inventory was filed February 19, 1935. The Probate Court entered all the orders requested in Hamilton's petition.

The record from the Circuit Court shows that after the letters of administration were issued an examination was made of the estate's deposit box of defendant on March 4, 1935, and an inventory of its contents made; that there were present at this time a representative of the inheritance tax office for Illinois, name Marie, administratrix, J. Louis Norton, her attorney, and a representative of the Safety Deposit Company; the contents of the box were listed and numbered, among other things, a balance in the savings account of defendant in the Northern Trust Company of over \$2000; there were also other items of money.

March 12, 1935, administratrix withdrew from this savings account \$2500.00 and deposited it in her account on administrative; March 20th she withdrew \$2000.00 from this account and the following day the balance.

September 24, 1935, the administratrix filed her inventory in the estate purporting to list all of the assets; the inventory

listed \$631.96 in cash. February 19, 1936, the supplemental inventory was filed, in which the administratrix listed \$6000 in Government bonds, stating under oath that these assets had come into her hands since the filing of the first inventory. This supplemental inventory was misleading. She had purchased the bonds in March, 1935. They never belonged to decedent although the money to buy them did.

The Circuit court on December 14, 1936, held that the administratrix and her attorney had committed a fraud upon the Probate court; that the supplemental inventory was filed February 19, 1936, and not within one year from the date of issuance of letters; the order closing the estate was vacated, the administratrix ordered to publish for claims against the supplemental inventory and leave was given the claimants represented by Hamilton to file their claim instantler. The appeal is from this order.

The administratrix first says the jurisdiction of the Probate court expired upon the entry of the order closing the estate and discharging her. It is too well settled to require argument that the Probate court in the exercise of its equitable powers can set aside any order procured by fraud or due to accident or mistake. Heppe v. Szczepanski, 209 Ill. 88; Whittemore v. Coleman, 239 Ill. 450; Shepard v. Speer, 41 Ill. App. 211; Schlink v. Maxton, 153 Ill. 447.

Section 70, chapter 3, Ill. State Bar Stats. 1935, provides that all claims not exhibited in the court of administration within one year from granting letters shall be barred as to property and estate which has been inventoried, and if thereafter an inventory is filed listing other property not previously inventoried, notice shall be published as provided by section 60 of the act. No such notice was published in the present case. The records show that the supplemental inventory was filed February 19th and not on the

listed \$31.00 in cash. February 10, 1936, the supplemental inventory was filed, in which the administrator listed \$3000 in Government bonds, stating under each item there was no cash on hand since the filing of the first inventory. This supplemental inventory was admitted. The cash previously the bonds in March, 1936. They never belonged to deceased although the money to buy them did.

The circuit court on December 14, 1936, said that the administrator and her attorney had committed a fraud upon the Probate court; that the supplemental inventory was filed February 10, 1936, and not within one year from the date of issuance of letter; the order closing the estate was vacated. The administrator ordered to publish for claims against the supplemental inventory and leave was given the claimants represented by petition to file their claim instantly. The appeal is from this order.

The administrator files says the jurisdiction of the Probate court expired upon the entry of the order closing the estate and discharging her. It is too well settled to require argument that the Probate court in the exercise of its judicial power can set aside any order procured by fraud or due to accident or mistake. Repp v. Sweeney, 209 Ill. 68; Chilcote v. O'Brien, 230 Ill. 450; Repp v. Sweeney, 41 Ill. App. 211; Repp v. Sweeney, 133 Ill. 447.

Section 70, Chapter 3, Ill. State Bar Stat. 1935, provides that all claims not admitted in the court of administration within one year from the date of the order closing the estate and discharging the administrator shall be barred as to property and estate which has been inventoried, and if inventoried in inventory is filed listing other property not previously inventoried, a claim shall be admitted as provided by Section 60 of the act. No claim notice was public in the present case. The records show that the supplemental inventory was filed February 10, 1936, and not on the

18th as claimed by the administratrix. The order of the Probate court finding that it was filed on the 19th was in accordance with the facts.

Letters of administration were granted February 19, 1935, and the last day of the year within which to file claims was February 18, 1936. The People v. Coffin, 279 Ill. 401, 409; Irving v. Irving, 209 Ill. App. 318; Seaman v. Poorman, 272 Ill. App. 264, 267. The administratrix in her answer filed said, "the time for filing claims *** expired on February 18, 1936." No publication was made for claims against the assets inventoried February 19th and the court properly ordered that such publication be made.

However, our opinion does not turn on the exact date of filing the supplemental inventory. As we have heretofore said, the Probate court always has power to correct its orders procured by fraud or mistake.

There was sufficient showing to justify the finding of the Circuit court. The attorney for the administratrix says that the failure to inventory all the assets was through an oversight, an inadvertence on his part. Taking his statement as true, the failure to inventory these assets was such an accident or mistake as to empower the Probate court to enter the orders of which complaint is made.

The order of the Circuit court of December 14th was proper and is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

18th as alleged by the administrator. The order of the Probate Court finding that it was found on the 18th was in accordance with the facts.

History of administration was given February 19, 1935, and the last day of the year which was the 11th March 1935. February 18, 1935. The People v. Curtis, 270 Ill. App. 400; Living v. Living, 208 Ill. App. 418; Green v. Hoffman, 270 Ill. App. 234, 235. The administrator in her answer filed made, "The time for filing claims expired on February 18, 1935." No publication was made for claims against the assets investigated February 18th and the court properly ordered that such publication be made.

However, our opinion does not turn on the exact date of filing the report of the administrator. As we have previously said, the Probate Court always has power to correct its errors committed by fraud or mistake.

There was sufficient showing to justify the finding of the Circuit Court. The attorney for the administrator says that she failed to inventory all the assets and through an oversight, an inadvertence on his part. Finding his statement as true, the failure to inventory these assets was such an admission of mistake as to give the Probate Court to alter the order of administration if made.

The order of the Circuit Court is reversed and the case is affirmed.

REVEREND,

O'Connor, W. J., and Mahoney, J., concur.

39534

ADIN W. FINLEY,
Appellant,

vs.

JAMES W. PAIGE,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

292 I.A. 636¹

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Judgment by confession for \$661.20 was entered against defendant upon his promissory note dated December 4, 1934, in the principal sum of \$500, payable to plaintiff.

Defendant filed a petition to vacate the judgment alleging that in June, 1935, the partnership existing between plaintiff and defendant was dissolved by mutual agreement and that defendant assigned to plaintiff his one-half interest in certain accounts due the partnership. A document purporting to be an assignment signed by defendant but not by plaintiff is attached to the petition, reciting that one-half of all moneys received by the partnership be applied to the payment of defendant's note of \$500. Leave was given to defendant to appear and defend, the judgment was ordered to stand as security, and the case went to trial.

Upon hearing by the court the judgment was vacated and judgment was entered against plaintiff, from which he appeals. Defendant does not appear in this court.

Defendant testified that plaintiff was dissatisfied with the partnership and in June, 1935, it was agreed that it be dissolved; that defendant stated he would give plaintiff an assignment of all the accounts to apply on the note and that he drew up such an assignment, which plaintiff objected to and did not accept. Later on defendant drew another assignment, a copy of which was introduced in evidence, dated July 2, 1935, which purports to assign to plaintiff defendant's one-half interest in the profits from an

2221 A. 688

THE UNITED STATES OF AMERICA

IN SENATE

REPORT

OF

COMMISSIONERS

THE NATIONAL BUREAU OF INVESTIGATION

REPORT OF THE COMMISSIONERS FOR THE YEAR 1921

AND OF THE NATIONAL BUREAU OF INVESTIGATION

FOR THE YEAR 1921

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engraving plant sold to a daily paper in Arkansas, the profits to be applied upon defendant's note for \$500 held by plaintiff. The document also purported to assign to plaintiff, to be applied on defendant's note, one-half interest in the profits from the business of the partnership during the previous month. This document was not signed by either of the parties. Defendant testified that he gave the original of this document to plaintiff, who accepted it.

Defendant also introduced evidence tending to show that the Jonesboro, Arkansas, paper had paid to the partnership \$800 in full; also a letter from a bank in Chicago certifying that there was deposited in the partnership account during the months of May to October, 1935, inclusive, the sum of \$1129.11. Defendant says that during these months he had no connection with the business of the partnership and received no money from it, as he left it all to plaintiff to settle up; that he never heard anything further from plaintiff about the note until after judgment was entered.

Plaintiff testified there was no agreement that the defendant's note should be paid out of the accounts of the partnership business; that there was no contract that it should be paid in any such way; that defendant attempted to give plaintiff an assignment of profits but plaintiff refused to accept it and gave it back to defendant; that he told defendant there were no profits; that when defendant requested him to accept the document of July 2, purporting to assign one-half of the profits to plaintiff, he told defendant there were no profits - "There is nothing but losses" and that he would not accept an assignment.

In order to support the defense it was necessary to prove the acceptance by plaintiff of the alleged assignment of profits or accounts. On this point the parties contradict each other,

entirely clear that the note was not a valid note in Tennessee, and that it was not applied upon defendant's note for 1000 dollars of liability. The document also purports to contain a statement, which is not a statement of the partnership during the previous month, which statement was not signed by either of the parties. Defendant testified that he gave the original of this document to plaintiff, who admitted it.

Defendant also introduced evidence tending to show that the Tennessee, Alabama, Georgia and South Carolina banks in fall; also a letter from a bank in Chicago dated in fall; there was presented in the partnership account books the account of pay to October, 1900, inclusive, and was at that time, defendant says that during these months he had no connection with the partnership of the partnership and received no money, that is, in the fall it all to plaintiff to receive; and he never received anything further from plaintiff about the note until after plaintiff was entered.

Plaintiff testified there was no agreement that the defendant's note should be paid out of the account of the partnership business; that there was no contract that it should be paid in any other way; that defendant attempted to give plaintiff an assignment of the note but plaintiff refused to accept it and gave it back to defendant; that he told defendant that when he received the note after defendant received his money, the account of this note, supporting to assign one-half of the proceeds to plaintiff, he said defendant there were no profits - "There is nothing but losses" and that he would not accept an assignment.

In order to support his claim it was necessary to prove the recognition by plaintiff of the alleged assignment of the note on account. On this point the parties testified as follows:

defendant asserting acceptance and plaintiff denying it. The burden was upon defendant to prove acceptance, and after considering the respective stories it cannot be said that this burden was sufficiently sustained.

It also was incumbent upon defendant to show that there were profits in which his interest was sufficient to pay his note. Plaintiff asserted that there were no such profits and defendant did not prove to the contrary. Plaintiff's counsel offered in evidence a statement made by an accountant showing the result of an examination of the books of the partnership, but the court sustained defendant's objection to this.

For the reasons stated, we are of the opinion that the defense presented was not proven. The judgment against defendant is reversed and the cause is remanded with directions to vacate the order vacating the judgment, leaving the judgment to stand as originally entered on April 21, 1936.

REVERSED AND REMANDED WITH
DIRECTIONS.

O'Connor, P. J., and Matchett, J., concur.

deliberate and conscious attempt to defraud the
 public was shown by the fact that the defendant
 had the respective shares in the company and was
 actually selling.

It was also shown that the defendant had been
 guilty in which his interest was involved in the
 defendant's attempt to defraud the public. The
 did not prove to the contrary. The defendant's
 evidence a statement made by an individual during the
 an admission of the fact of the defendant's, and the
 defendant's attempt to defraud the public.

For the reasons stated, the court of the
 defendant presented was not proven. The defendant's
 is reversed and the case is remanded to the
 the order vacating the judgment, leaving the judgment as
 originally entered on March 11, 1922.

WILLIAM H. HARRIS, JR.
 ATTORNEY AT LAW

O'Connor, M. J., and others, vs. O'Connor, J., et al.

THE FIRST NATIONAL BANK OF CHICAGO,
a National Banking Association,
Appellee,

vs.

DANIEL A. QUINN, MARTIN J. McNALLY,
THOMAS E. SULLIVAN, CLARE A. SULLIVAN,
ROBERT G. McKAY, HENRY PASCHEN, CHICAGO
TITLE AND TRUST COMPANY, a Corporation,
as Trustee under Trust Agreement known
as Trust No. 16267, recorded as Document
No. 9193175, HENRY V. MUELLER, RUTH
MUELLER, HELEN V. BARRETT, as Executrix
of the Last Will and Testament of
Charles V. Barrett, et al.,

APPEAL FROM
CIRCUIT COURT
OF COOK COUNTY.

292 I.A. 636²

On Appeal of ROBERT G. McKAY et al.,
Appellants.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is by McKay and other defendants from a decree of foreclosure entered in the Circuit court of Cook county May 27, 1936. The decree was entered upon the recommendation of the report of a master and finds that there is due to the plaintiff the sum of \$112,485. The cause was heard by the chancellor upon exceptions to the master's report, the exceptions being overruled.

The bill of complaint was filed May 24, 1935, and avers the execution of the trust deed on November 6, 1925, to secure five notes payable to bearer in the aggregate principal amount of \$334,000 with interest at the rate of 6% per annum. The makers of the notes were Daniel A. Quinn and Martin J. McNally. The premises conveyed consists of 213 acres of land within the limits of the City of Chicago, lying between 75th and 79th streets and between Crawford and Cicero avenues. After the recording of the trust deed the land was subdivided and is now known as Frank A. Mulholland's 79th street, etc., Subdivision. The title to the premises was conveyed to the Chicago Title and Trust Company as

THE FIRST NATIONAL BANK OF CHICAGO,
a national banking association,
Appellee.

v.

DAVID A. WORTH, CASPER V. SCHMIDT,
THOMAS A. SCHMIDT, GEORGE A. SCHMIDT,
RICHARD G. SCHMIDT, JOHN G. SCHMIDT,
JAMES A. SCHMIDT, a corporation,
as Trustee under Trust Agreement, Case
No. 10287, recorded as Book 10287
No. 21931, County of Cook, State of
Illinois, Appellants, vs. SCHMIDT,
of the First National Bank of Chicago,
Charles V. Schmidt, et al.,

2821 A. 686

On Appeal of CHARLES V. SCHMIDT, et al.,
Appellants.

ALL JUSTICE NATIONAL BANKING AND TRUST COMPANY OF CHICAGO.

This appeal is by writ of certiorari from a decree
of foreclosure entered in the Circuit Court of Cook County May 27,
1930. The decree was entered upon the recommendation of the report
of a master and this case is one to the Circuit Court and
of \$112,400. The same was made by the Chancellor upon execution
to the master's report, the Chancellor being overruled.
The bill of complaint was filed May 24, 1929, and reads
the execution of the trust deed on November 8, 1928, in which
five notes payable to bearer in the aggregate principal amount of
\$384,000 with interest at the rate of 10 per cent. The notes
of the notes were David A. Schmidt and Casper V. Schmidt. The
petitioner conveyed property of his name of land within the limits
of the City of Chicago, lying between 75th and 76th streets and
between Grand and Chicago avenues. After the recording of the
trust deed the land was subdivided and is now known as Block A
Kohlman's 75th Street, etc., subdivision. The title to the
premises was conveyed to the Chicago Title and Trust Company as

trustee and became the subject matter of that company's Trust No. 16267. The trust agreement provides that the property is held (according to their interest as shown by the number of their respective units of beneficial interest) for 17 persons: E. A. Kalkhurst, Thomas E. Sullivan, Joseph D. Ryan, Henry Paschen, Charles V. Barrett, George F. Barrett, Robert G. McKay, William J. Lang, R. D. McLean, Harry Mosier, Benjamin Bosley, Arthur C. Hammond, Eliot H. Evans, William P. Cagney, David S. Komiss, Joseph J. Sullivan and Frank G. Hajicek. The trust instrument also provides that the trustee is to deal with the real estate only when authorized so to do on the written direction of Charles V. Barrett, Henry Paschen, Thomas E. Sullivan and Robert G. McKay. In case of the inability of Charles V. Barrett, George F. Barrett is authorized to act for him, and in like case Jacob Paschen for Henry Paschen, Joseph J. Sullivan for Thomas E. Sullivan, and William J. Lang for Robert G. McKay.

Four mortgage notes identified as "A", "B", "C" and "D" for the aggregate amount of \$200,000 were paid and cancelled prior to October 26, 1930, when principal note, identified as "E" for \$134,000 became due. In the meantime this note "E" and the trust deed securing it had become the property of the First Union Trust and Savings Bank, which was unwilling to extend the loan and the beneficiaries did not wish to pay it at that time. Thereupon Thomas E. Sullivan, Barrett, McKay and Paschen, acting for the syndicate, opened negotiations with the Foreman State Trust and Savings Bank for a loan of \$110,000, the proceeds of the loan to be used in paying this indebtedness to the First Union Trust and Savings Bank on account of note "E", the unpaid principal of which it was proposed should be reduced to that amount. The plan was to purchase the note and place it with the Foreman State Trust and Savings Bank as collateral for its loan to the manager beneficiaries

trusts and assigns the subject matter of said company's trust to
 1928. The trust agreement provides that the property is held
 (according to itself) as shown by the books of said trust
 (negative unit of beneficial interest) for 17 persons: A. B.
 Kalkbrenner, Thomas E. Sullivan, Robert E. Ryan, Henry Kalkbrenner,
 Charles E. Kalkbrenner, George E. Kalkbrenner, Robert E. Ryan, William
 J. Lang, R. D. Kalkbrenner, Henry Kalkbrenner, Benjamin Kalkbrenner, Arthur E.
 Kalkbrenner, Elliot E. Kalkbrenner, William E. Kalkbrenner, David E. Kalkbrenner,
 Joseph E. Kalkbrenner and Frank E. Kalkbrenner. The trust instrument
 also provides that the trustee is to deal with the trust estate
 only when authorized so to do on the written direction of Kalkbrenner
 V. Kalkbrenner, Henry Kalkbrenner, Thomas E. Sullivan and Robert E. Ryan.
 In case of the inability of Charles E. Kalkbrenner, George E. Kalkbrenner
 is authorized to act for him, and in like case Joseph Kalkbrenner for
 Henry Kalkbrenner, Joseph E. Kalkbrenner for Thomas E. Sullivan, and
 William J. Lang for Robert E. Ryan.

Four mortgage notes identified as "A", "B", "C" and "D"
 for the aggregate amount of \$20,000 were paid and cancelled prior
 to October 20, 1928, when principal note, identified as "E" for
 \$134,000 became due. In the meantime said note "E" and the trust
 deed securing it had become the property of the First Union Trust
 and Savings Bank, which was unwilling to extend the term and the
 beneficiaries did not wish to pay it at that time. Consequently
 Thomas E. Sullivan, Kalkbrenner, Kalkbrenner and Kalkbrenner, acting for the
 syndicate, opened negotiations with the First Union Trust and
 Savings Bank for a loan of \$100,000, the proceeds of the loan to
 be used in paying this indebtedness to the First Union Trust and
 Savings Bank on account of note "E", the unpaid principal of which
 at the proposed amount be reduced to that amount. The plan was
 to purchase the note and place it with the First Union Trust and
 Savings Bank as collateral for the loan at the proposed beneficiaries

of \$110,000 upon their personal note. About October 26, 1930, the managers of the syndicate, through Thomas E. Sullivan (the bank being represented by Walter J. Cox, vice-president) agreed that the manager beneficiaries would execute their note for \$110,000 to the order of the Foreman bank, and when note "E" should be released from the First Trust and Savings Bank they would deposit it with the trust deed as security for their said note, to be held by the Foreman bank as a pledge for the payment of the note of the manager beneficiaries. It was also agreed that the maturity of note "E" should be extended to October 26, 1932, and that the time of payment of the note of the managers would be extended from time to time by means of the execution of successive renewal notes maturing 90 days after their respective dates during this two year period.

The managers of the syndicate at this time maintained an agency account for the syndicate at the Foreman bank. Pursuant to the plan, on October 25, 1930, they authorized the Foreman bank to pay to the First Trust and Savings bank out of this syndicate account the sum of \$27,796.67. This payment was made and applied on note "E", meeting the interest due thereon up to October 26, 1930, in full and reducing the principal indebtedness on that date from \$134,000 to \$110,000. Pursuant to the plan, the Foreman State Trust and Savings Bank on October 25, 1930, executed and delivered to the managers of the trust the draft of the Foreman bank for \$110,000, payable to the First Union Trust and Savings Bank, for the purpose of purchasing the principal promissory note "E" due October 26, 1930, the principal of which had been reduced to \$110,000 by this payment out of the syndicate account. Issuance of this check was authorized in writing by the managers. These four managers, Barrett, Sullivan, McKay and Paschen, at the same time executed and delivered to the Foreman bank their joint personal

of \$110,000 upon their personal note. About October 22, 1932, the managers of the syndicate, through Thomas E. Sullivan, the bank being represented by William J. Cox, vice-president, advised that the manager beneficiaries would execute their note for \$110,000 to the order of the Foreman Bank, and when note "B" should be released from the first trust and savings bank they would execute it with the trust deed as security for their note, to be held by the Foreman Bank as a pledge for the payment of the note of the manager beneficiaries. It was also agreed that the maturity of note "B" should be extended to October 22, 1933, and that the time of payment of the note of the managers would be extended from time to time by means of the execution of successive renewal notes maturing 90 days after their respective dates during this two year period.

The managers of the syndicate at this time maintained an agency account for the syndicate at the Foreman Bank. Pursuant to the plan, on October 22, 1932, they authorized the Foreman Bank to pay to the first trust and savings bank out of this agency account the sum of \$110,000. This payment was made and applied on note "B", meeting the interest due thereon as of October 22, 1932, in full and reducing the principal indebtedness on that date from \$134,000 to \$110,000. Thereafter on the plan, the Foreman Bank and Savings Bank on October 22, 1932, executed and delivered to the managers of the first trust and savings bank for \$110,000, payable to the first trust and savings Bank, for the purpose of purchasing the principal ninety day note "B" due October 22, 1933, the principal of which had been reduced to \$110,000 by this payment out of the syndicate account. Release of this check was authorized in writing by the managers. These four managers, Barrett, Sullivan, Gandy and Tanager, at the same time executed and delivered to the Foreman Bank their joint personal

note dated October 25, 1930, by its terms due 90 days after date. This note expressly stated that note "E" and the trust deed were pledged as security for the payment of it. The evidence indicates that manager Sullivan delivered the draft for \$110,000 to the Union Trust and Savings Bank, which delivered the note and trust deed to him uncanceled and made the appropriate entry on their books, indicating the matter was closed. Sullivan then took the note "E" and trust deed securing it to the Foreman bank, endorsing thereon a statement to the effect that the time of payment had been extended for two years. It was then delivered to the Foreman bank as collateral to the personal note of the managers, according to the arrangement that had been made.

As had been agreed, this note was thereafter renewed from time to time for the respective balances from time to time due thereon. By December, 1932, through payments made, the amount of this note had been reduced to \$88,000. Thereafter no payments either of principal or interest were made. On December 31, 1931, Charles V. Barrett died. The Foreman Trust and Savings Bank filed its claim upon the personal note against his estate in the Probate court of Cook county, and it was allowed for \$90,000.

In the meantime the Foreman State Trust and Savings Bank had been consolidated with the plaintiff bank and a committee for the liquidation of its assets had been organized. Some unsuccessful efforts to realize upon this indebtedness were made by plaintiff. Subsequent to December 30, 1932, Thomas E. Sullivan wrote that the members of the syndicate had been wiped out and lost hope of being able to meet the obligation. November 6, 1934, Sullivan wrote plaintiff that he was authorized to offer \$40,000 in cash for principal note "E" and the release of security held for its payment. The proposal was rejected. Sullivan gave evidence before the master

note dated October 25, 1951, by the State and the other side.
This note was received by the State on October 25, 1951, and the State
placed it in the file of the Department of the Interior. The note was
first received by the State on October 25, 1951, and the State
first and having been which the State and the State and the State
who received it was the State and the State and the State and the State
the note was dated, October 25, 1951, and the State
dated according to the State and the State and the State and the State
to the effect that the State and the State and the State and the State
years. It was then delivered to the State and the State and the State
the personal note of the State, according to the State and the State
that had been made.

As has been stated, this note was received by the State
time to time for the State and the State and the State and the State
thereon. By December 1, 1951, the State and the State and the State
this note had been received by the State and the State and the State
either of the State or the State and the State and the State and the State
Charles V. Hertz and the State and the State and the State and the State
its claim upon the personal note which the State and the State and the State
court of the State, and it was allowed for the State.

In the meantime the State and the State and the State and the State
had been considered and the State and the State and the State and the State
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efforts to resolve the State and the State and the State and the State
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Proposal was received.

tending to show that in January, 1935, he increased this offer to \$45,000, and Sullivan, McKay, Cagney and Ryan gave testimony to the effect that they were ready, willing, and much more than able to raise this amount of \$45,000 at that time for this purpose. However, there is a conflict in the evidence as to whether this offer was ever made to the liquidation committee representing the plaintiff, and plaintiff gave evidence tending to show that the beneficiaries of the trust had informed plaintiff that they were without funds to raise money to pay the indebtedness. They also testify that no offer of more than \$40,000 was made in behalf of the syndicate prior to April 29, 1935. The master finds that defendants allowed the creation of an appearance that they were without funds and unable to meet this obligation.

Several months prior to March 7, 1935, plaintiff entered into negotiations with Morris Markin by which the control of the personal note of the managers and collateral thereto ^{should} be transferred to Markin. Benjamin Samuels and Julius Jesmer acted for Markin. The testimony offered in plaintiff's behalf is to the effect that Markin at first offered \$40,000, which was thereafter raised to \$45,000. Markin, it seems, also insisted that the claim against the Barrett estate should be assigned to him. The result of the negotiations was that on March 9, 1935, the liquidation committee met and passed a resolution at the request of Mr. Kiddoo, vice-president of the plaintiff bank, accepting the proposition of Markin. Prior to this time, in December, 1934, plaintiff solicited an offer of \$60,000 from George F. Barrett but received no reply. From December, 1934, to April, 1935, plaintiff was in negotiations with Barrett in attempts to get payment from the estate of Charles V. Barrett. During the same time plaintiff negotiated with Markin, Samuels and Jesmer. Pending these negotiations plaintiff never served any formal notice on the beneficiaries of Trust No. 16267

tending to show that in January, 1938, the defendant said after he
 42,000, and Oliver, Moore, Gandy and Guss were returning to the
 effect that they were ready, willing, and able to pay him 42,000
 raise this amount of 42,000 at that time for this purpose. However
 there is a conflict in the evidence as to whether this offer was ever
 made to the litigation committee representing the district, and
 plaintiff gave evidence tending to show that the committee at
 the time had informed plaintiff that they were almost ready to
 raise money to pay the indebtedness. They also testify that no
 offer of more than 42,000 was made in behalf of the defendant
 prior to April 30, 1938. The matter then was referred to the
 the creation of an agreement that they were almost ready to
 unable to meet this obligation.

Several months prior to March 7, 1938, plaintiff contacted
 into negotiations with Horne's estate by which the control of the
 personal note of the defendant and collateral mortgage, he transferred
 to plaintiff. Plaintiff's income and John Gandy acted for him.
 The testimony offered in plaintiff's behalf is to the effect that
 Horne at first offered 42,000, which was rejected and then to
 42,000. Plaintiff, it seems, also insisted that the estate pay
 the estate should be assigned to him. The result of the
 negotiations was that on March 7, 1938, the litigation committee
 met and passed a resolution to the payment of 42,000, plus-

present of the plaintiff's bank, according to the resolution of
 plaintiff. Prior to this time, in December, 1934, plaintiff assigned
 an offer of 42,000 from George F. Gandy and received no reply.
 From December, 1934, to April, 1935, plaintiff was in negotiations
 with Horne in attempt to get payment from the estate of Horne
 V. Horne. During the same time plaintiff negotiated with Horne,
 Gandy and Guss. During these negotiations plaintiff never
 received any formal notice or the liquidation of Horne's estate.

that negotiations for the sale of the collateral note were under way. Jesmer is Markin's brother-in-law and is a member of the Illinois bar. Markin intrusted the negotiations almost entirely to his brother-in-law and Samuels. Markin is president of the Checker Cab Manufacturing company. Snyder and Kiddoo, who represented the bank, were vice-presidents and were acquainted with Markin, with whom they concluded a contract April 29, 1935. The contract recites that the bank holds the note of October 26, 1931, for the principal amount of \$95,000, signed by Thomas E. Sullivan, Charles V. Barrett, R. G. McKay and Henry Paschen; that this note had been reduced to \$88,800; that it is past due and (with interest to July 29, 1932) amounts to \$88,800; that the note "E" of November 6, 1925, in the principal sum of \$134,000 has been deposited as collateral security therefor; that said note is secured by the trust deed; that in its effort to liquidate the indebtedness, plaintiff filed a claim against the estate of Charles V. Barrett, which had been allowed; that the bank will file suit to foreclose the trust deed; that Markin has paid \$15,000 and will pay the further sum of \$30,000 plus attorneys' fees, court costs, etc.; that the bank would at any sale held under decree of foreclosure cause to be bid such sum or sums as attorneys of Markin might advise it to bid, but in no event less than \$45,000; that in the event the bank was the successful bidder, Markin would immediately pay \$30,000 plus attorneys' fees, court costs, etc., and the bank should assign to him the master's certificate of sale; that if the bank was not the successful bidder at the foreclosure sale and a sum less than the full amount found due was bid by some other person and paid, the bank would, on demand, pay over to Markin the money so received by it less \$30,000, etc., would assign to Markin any deficiency decree or judgment, endorse and deliver without recourse the collateral note and assign to Markin the claim against

the estate of Charles V. Barrett, together with all other instruments which Markin might consider necessary to convey to him all right, title and interest in the collateral note and the collateral deposited therewith, etc.

Defendants contend that Thomas E. Sullivan, Paschen, Barrett and McKay are not indebted on the \$95,000 note. It is said that when the land was conveyed in 1925 the unpaid mortgage to the amount of \$334,000 was treated as a part of the consideration for the purchase price of the land which the syndicate bought from Quinn, and that the members of the syndicate, as such, became liable for the mortgage debt, and that this is the only debt in the case. Defendants cite Ingram v. Ingram, 172 Ill. 287, and Siegel v. Borland, 191 Ill. 107. The authorities sustain the proposition that the purchasers under such circumstances became liable for the mortgage debt. But conceding this, we think it is nevertheless true that the managers, by the execution of their personal note for the balance then due, under all the circumstances became liable thereon personally to the Foreman bank. However, no personal judgment was taken against these defendants or the other members of the syndicate in the foreclosure decree. Plaintiff had the undoubted right to and did waive its right to such judgments.

However, these four signers of the collateral note we think became personally liable to the Foreman bank. The bank parted with \$110,000 for that note with the agreement that the mortgage note "E", then past due, together with the trust deed securing it, were to be deposited as security for the payment of the note of the managers. Defendants now question the title of the managers to note "E" and their legal right to pledge it as collateral for their individual debt. This tardy contention cannot be sustained. The individual debt of the managers to the bank was incurred for the

the estate of Charles V. Barrett, deceased, with all other interests which bear in it, and transfer necessary to convey to his heirs, title and interest in the collateral note and the collateral deposited therein with, etc.

Defendants contend that Thomas L. Sullivan, President, Barrett and McKay are not interested in the \$25,000 note. It is said that when the land was conveyed in 1925 the unpaid mortgage to the amount of \$334,000 was treated as a part of the consideration for the purchase price of the land which the syndicate bought from Quinn, and that the members of the syndicate, as well, became liable for the mortgage debt, and that this is the only debt in the case.

Defendants cite In re V. L. L. 172 Ill. 277, and In re V. L. L. 191 Ill. 107. The authorities cited in the proposition that the purchasers under such circumstances become liable for the mortgage debt. But conceding this, we think it is nevertheless true that the members, by the execution of their personal note for the balance then due, under all the circumstances become liable thereon personally to the Foreman Bank. However, no personal judgment was taken against these defendants or the other members of the syndicate in the foreclosure decree. Plaintiff had the undoubted right to and did waive its right to such judgments.

However, these four members of the collateral note we think become personally liable to the Foreman Bank. The bank parted with \$110,000 for that note with the agreement that the mortgage note was, then past due, together with the first debt securing it, were to be deposited as security for the payment of the note of the managers. Defendants now question the title of the managers to note "B" and their legal right to pledge it as collateral for their individual debt. This very contention cannot be sustained. The individual debt of the managers to the bank was incurred for the

benefit of the syndicate. The repudiation of it now is inconsistent with the conduct of the syndicate as shown by the uncontradicted evidence. It is also inconsistent with other contentions now made by defendants in this court, and would amount to the perpetration of a fraud on plaintiff bank.

Defendants strenuously argue that the bank is not entitled to pursue two opposite and inconsistent theories; they say that the \$95,000 note is either the bona fide separate debt of the four managers who made it and the mortgage note their own property so that they could lawfully pledge it, or it is the debt of the syndicate and the syndicate note is merely pledged as collateral for the syndicate's debt. Upon this last assumption, defendants say before the bank can dispose of the collateral or sell the master's certificate the bank must give notice to the syndicate, which is in equity entitled to its chance to pay the \$95,000 note or whatever amount the bank is willing to take for it before it can sell the note and collateral to Markin, a stranger. There are, argue defendants, two pledges and therefore two separate rights to redemption. We cannot accept this argument. It rests on a fundamental misapprehension of the nature of the transaction between Markin and plaintiff. Plaintiff was the holder of the principal collateral note on which, when payments ceased to be made by the syndicate, there was an unpaid balance due of \$88,000. It also held as collateral to this the note "E" secured by a trust deed upon the premises held in trust by the Chicago Title & Trust Company for the syndicate. The bank did not sell the collateral. Practically it agreed to sell the note of the managers to which the trust deed and the note "E" were collateral security. The contract provided that the bank should foreclose the trust deed. The bank had a perfect right to do this. Peacock v. Phillips, 247 Ill. 467, and Kessler v. Sherman, 281 Ill.

App. 148. The agreement between the bank and Markin provided for the sale of the master's certificate when and if it ^{were} obtained at the foreclosure sale. This did not interfere with any right of redemption defendants possessed. The contract between plaintiff and Markin does not shut out their right of redemption. Under the decree of foreclosure defendants still have the right to redeem from the foreclosure sale and the further right to have credited upon the principal note the proceeds of the foreclosure sale. Defendants can get back their collateral by paying the principal note it was given to secure. Defendants fail to distinguish between the sale of a principal note and the sale of the collateral securing that note. Failure to recognize this distinction leads defendants to cite many authorities and indulge in much argument altogether inappropriate to the issues. Such is their assertion that the failure by the debtor to pay the principal debt does not vest the title to the collateral in the pledgee; that is is an essential element of a pledge that the pledgor has a right to redeem and that a demand for payment is required even though the pledge agreement stipulates that the pledgee may sell at public or private sale without notice; that even after demand and notice to redeem the pledgee cannot make a valid sale of the collateral without giving a reasonable notice of the time and place of sale; that by accepting payments on account and granting indulgences, the pledgee waives all right to sell without notice; that prior to a valid sale there is no limitation of time on the pledgee's right to redeem the pledge; that the words, "at any moment up to sale" used in connection with the right to redeem the pledge, mean "at any moment up to the time of the exercise by the pledgee of his power of sale by entering into a valid contract of sale"; and that the pledgors' right to redeem is unaffected by a transfer of the collateral by the pledgee not amounting to a sale in accordance with the terms of

the pledge. All these propositions (elementary law when applied to cases involving the exercise of the power of sale under a collateral note) are inapplicable to this case where no such sale is involved.

Defendants further contend that George F. Barrett, Sr., in the transaction resulting in the contract between Markin and the bank, occupied a double fiduciary capacity and they invoke the rule that a co-beneficiary cannot enter into or participate in a secret compact adverse to the interest of his co-tenants. They contend, therefore, that the Markin contract was and is invalid. The contention cannot prevail. In the first place, the master found, and the decree approved the finding, that Barrett, Sr., did not participate in the making of the contract with Markin. But however that may be, the question of the validity of that contract as between the members of the syndicate does not in any way affect the right of the bank to foreclose this trust deed. Markin is not a party to this suit. Neither the validity of his contract nor the equities of the members of the syndicate can be settled in this proceeding. Defendants again call attention to the fact that the purchaser of a mortgage takes it subject to equities and that a defense good as against the assignor is good as against the assignee; that an assignee is put upon inquiry as to any reasons why the mortgage should not be paid. This, too, is true, but does not in any way affect the plaintiff's right to foreclose. The same observation applies to defendant's contention that the agreement to assign the decree to Markin is invalid, and that Markin has breached his executory contract, and that it is therefore unenforceable. Markin is not a party to this proceeding. The equities of the defendant members of the syndicate as between themselves and others dealing with them constitute no defense to the foreclosure of the trust deed. Defendants will not be precluded from having their

rights adjudicated as to these things in appropriate proceedings.

There is no reversible error in the record, and the decree is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

rights adjudicated as to these things in appropriate proceedings.
 There is no reversible error in the record, and no decree
 is therefore affirmed.

WILLIAMS.

O'Connor, J. J., and McLaughlin, J. J., dissent.

EUGENE L. GAREY, doing business
as GAREY & GAREY,

Appellant,

vs.

DANIEL J. SCHUYLER, Jr., CHARLES
WEINFELD, EDWARD J. HENNESSY,
HARVEY E. WOOD, WILLIAM C. GRAVES,
FRANCIS M. KING, JOHN G. RICHERT,
and GEORGE W. LENNON, doing business
as SCHUYLER, WEINFELD & HENNESSY,
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

292 I.A. 636³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This controversy is between plaintiff, a practicing lawyer in New York, and defendants of the same profession in Chicago. Plaintiff sued to recover \$1,000 being one-third of the fees received by defendants from Ella Margaret Lee for legal services rendered in her behalf. Plaintiff claimed that these legal matters were forwarded by him to defendants, and that defendants expressly promised to pay him one-third of the fees they should receive, which he also contends is the reasonable and customary portion of the fees defendants, as recipient lawyers, were obligated to pay. Defendants denied that plaintiff forwarded the business in question; denied the promise to pay one-third or any other part of the fees received from Mrs. Lee, and denied that they ever collected any fees from Mrs. Lee for the use and benefit of plaintiff. By way of counterclaim in the alternative, defendants say that if plaintiff is entitled to recover from them, they in turn are entitled to recover from plaintiff a reasonable portion of the sum of \$3200 in fees, which plaintiff collected directly from Mrs. Lee. Plaintiff, answering the counterclaim, denies that defendants are entitled to any part of such fees collected by him.

The cause was tried by the court without a jury. There

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OFFICE OF THE
CLERK OF THE COURT

DANIEL J. SCHUYLER, JR., CLERK
WILLIAM J. SCHUYLER, JR., CLERK
HARVEY A. WOOD, CLERK
FRANCIS A. WOOD, CLERK
and GEORGE F. WOOD, CLERK
as SCHUYLER, WILSON & SCHUYLER,
Appellants.

222 I.A. 636

RE. JUSTICE MATTHEW DELIVERED THE OPINION OF THE COURT.

This controversy is between plaintiff, a practicing lawyer in New York, and defendants of the same profession in Chicago. Plaintiff sued to recover \$1,000 being one-third of the fees received by defendants from this partnership law for legal services rendered in her behalf. Plaintiff claimed that when legal fees were distributed by the defendants, and that defendants were expressly promised to pay one-third of the fees they would receive, which he also contends is the reasonable and customary portion of the fees defendant, as resident partner, were entitled to pay. Defendants denied that plaintiff received the business in question; denied the promise to pay one-third or any other part of the fees received from this law, and denied that they ever collected any fees from this law for the use and benefit of plaintiff. By way of counterclaim to the affirmative, defendants pay that if plaintiff is entitled to recover from them, they in turn are entitled to recover from plaintiff a reasonable portion of the sum of \$1000 in fees, which plaintiff collected directly from the law. Plaintiff, answering the counterclaim, denies that defendants are entitled to any part of such fees collected by him. The case was tried by the court without a jury. There

was a finding for defendants as to plaintiff's claim; a finding for plaintiff as to defendants' counterclaim, with judgment on the finding, from which plaintiff appeals. The sole argument for reversal is that the finding and judgment against plaintiff is contrary to the evidence and entirely inconsistent with admissions made by defendants.

The material facts disclosed by the evidence are that on or about July 28, 1932, J. Edgar Lee, who lived at 911 Sheridan road in Evanston, died under circumstances which raised a question as to whether he had suicided. He left surviving him his wife, Ella Margaret Lee; he was in his lifetime engaged in the warehouse business in connection with the Currier-Lee Warehouse Company. He carried a number of life insurance policies, some of which provided for double indemnity in case of death by accident. A brother of the deceased, James L. Lee, lived at the Edgewater Beach hotel. Upon the death of J. Edgar Lee, James L. Lee, after talking with Mrs. Lee, called plaintiff on the long distance telephone in New York and asked him to come to Chicago; he came by plane and for a week or ten days thereafter consulted at various times with Mrs. Lee and relatives of J. Edgar Lee, investigated the circumstances of his death, attended the coroner's inquest, interviewed persons supposed to be familiar with the facts in regard to the insurance and the warehouse business. During the time he was in Chicago plaintiff lived with James L. Lee at the Edgewater Beach hotel. It was decided after consultation with plaintiff, Mrs. Lee, her brother, Mr. Hansen, and others, that it would be necessary to employ an attorney in Chicago, as plaintiff found it necessary to return to New York, and the business of Mrs. Lee would apparently require constant and long attention. Apparently, because of the known experience of Mr. Hennessy of the defendant firm, in connec-

was a finding for defendant to be guilty of murder; a finding for plaintiff to be guilty of manslaughter, with judgment on the finding, from which plaintiff appeals. The wife was away for several months and finding and judgment rendered plaintiff in favor of the defendant and plaintiff is dissatisfied with the finding and by defendant.

The material facts disclosed by the evidence are that on or about July 28, 1932, J. Edgar Lee, who lived at 111 Madison Road in Evanston, died under circumstances which raised a question as to whether he had been killed. He had previously been married. His wife was Lee; he was in his lifetime engaged to the wife. His business in connection with the Lee-Edgar Lee was the house. He carried a number of life insurance policies, some of which provided for double indemnity in case of death by accident. A brother of his deceased, James E. Lee, lived at the defendant's home. When the date of J. Edgar Lee, James E. Lee, after talking with Mrs. Lee, called plaintiff to the home and telephone in New York and asked him to come to Chicago; he came by plane and for a week or two days thereafter remained at various times with Mrs. Lee and relatives of J. Edgar Lee, investigating the circumstances of his death, obtaining the coroner's inquest, interviewed persons supposed to be familiar with the facts in regard to the insurance and the wife's conduct. During the time he was in Chicago plaintiff met with James E. Lee at the defendant's home. He was familiar with the defendant's wife, Lee. Her brother, Mr. Lee, was also in Chicago. It would be necessary to employ an attorney in Chicago, as plaintiff found it necessary to return to New York, and the business of Mrs. Lee was not particularly require constant and long attention. Apparently, because of the known existence of Mr. Kennedy at the defendant's home, in connection

tion with the warehouse business, it was decided to open negotiations looking toward his employment by Mrs. Lee as her local counsel. To that end the plaintiff in company with James L. Lee, called at defendants' office in Chicago and discussed the situation with Mr. Hennessy. Plaintiff's testimony is to the effect that in reply to the question of whether Mr. Hennessy would like to go into the matter with plaintiff, "he said he would be glad to go into anything with me, and he asked me what the financial situation was from a standpoint of being paid, and I told him that I thought there was enough of money and that he would be paid for his services; that I hadn't yet received anything myself, but I thought the situation would warrant payment of a reasonable fee, and he asked me on what basis I wanted him to handle it, and I told him that I thought my connection with the matter would shortly terminate because it was one of those things you have to be on the ground locally to handle and it was impossible to be handled by me; that all the things I could handle I would clean up before I left, so then I left the mess and everything else in his hands, and that we each bill for our respective services. He asked me whether or not I could get him a check on account, and I told him I could; that I would speak to Mrs. Lee about giving him a check on account as a retainer. He asked me on what basis I wanted to handle his end of the work and I said, at least the usual basis of a forwarder, two-thirds to you and one-third to me, and he said that is satisfactory."

Mr. Hennessy testifying for defendants gives a different account of this conference. He says in substance that in the course of the conversation he asked plaintiff, "how we were going to be paid." He said, "Well, it looks as though there was plenty here to pay the lawyers." Mr. Hennessy says there was no conversation as to any division of fees, that absolutely nothing was said about

tion with the witnesses present, it was decided to open negotiations looking toward his employment by him. But in the next moment, called at To that was the plaintiff in company with James L. Lee, called at defendant's office in Chicago and discussed the situation with Mr. Henry. Plaintiff's testimony is to the effect that in reply to the question of whether Mr. Henry would like to be made the matter with plaintiff, "he said he would be glad to be made a thing with me, and he asked me what the financial situation was from a standpoint of being paid, and I told him that I thought there was enough of money and that he would be paid for his services; that I hadn't yet received anything myself, but I thought the situation would warrant payment of a reasonable fee, and he asked me on what basis I wanted him to make it, and I told him that I thought my connection with the matter would justify him in making because it was one of those things you have to be on the ground closely to handle and it was impossible to be handled by me; that all the things I could handle I would have to handle myself, so that I felt the more and everything else in his hands, and that we each bill for our respective services. He asked me whether or not I could give him a check on account, and I said that I could; that I would agree to give him about fifteen hundred dollars on account as a retain fee. He asked me on what basis I wanted to handle his and of the work and I said, at least the usual basis of a lawyer, twenty-five to you and on a fifty to me, and he said that is satisfactory. Mr. Henry testified that defendant then a different account of this conference. He says in substance that at the close of the conversation he asked plaintiff, "how do you feel about this?" He said, "Well, it doesn't seem to me that there was anything to pay the lawyer." Mr. Henry says there was no conversation as to the division of fees, that plaintiff's feeling was that about

giving plaintiff one-third forwarding fee either on that occasion or on any other. Mr. James L. Lee, through whom plaintiff was brought to Chicago and first introduced to Mrs. Lee, it is agreed was present at this conversation but was not called as a witness, and defendants contend on the authority of East St. Louis Connecting Ry. Co. v. Altgen, 112 Ill. App. 471, affirmed in 210 Ill. 213, and King v. Swanson, 216 Ill. App. 294, that his absence without explanation justifies an inference that if he had been called as a witness his testimony would have been favorable to defendants. Mr. Hansen, brother of Mrs. Lee, and Mrs. Lee herself were called and gave evidence tending to show that the matter of Mr. Hennessy's legal experience in connection with warehouse matters was determinative in her decision to employ him as her local counsel. This evidence is, however, denied by plaintiff.

The uncontradicted evidence shows that defendants have received \$3000 from Mrs. Lee as compensation for their services. The evidence also shows without contradiction that the plaintiff billed Mrs. Lee directly from New York for \$3500 for his services; that \$2000 was paid him by Mrs. Lee, and that he thereafter sued her for the balance claimed, and that a settlement was made by paying to plaintiff the further sum of \$1200, making a total of \$3200, which plaintiff has received for his services.

The issue in the case seems to resolve itself into one of fact. In the first instance, of course, the burden of proof was on plaintiff to prove his case by a preponderance of the evidence. On the issue of fact, the finding of the court was against him and upon appeal to this court the finding of the court is entitled to the same weight as is the verdict of a jury. Beidler v. Richardson, 107 Ill. App. 536; Bird v. Louer, 272 Ill. App. 522. The only question, therefore, on this appeal is whether the finding of the

trial court is clearly and manifestly against the weight of the evidence. Illinois-Indiana Fair Assoc. v. Phillips, 241 Ill. App. 454, affirmed in 328 Ill. 363; Bird v. Lower, 272 Ill. App. 522. Plaintiff relies very much upon a letter written by defendants on September 21, 1932, concerning Mrs. Lee's affairs, in which defendants said:

"We have received a check for \$500 from her as a retainer and she stated that you had made a request for the payment of a retainer to you on account of your services. I shall handle the matter of fees in any way which will be satisfactory to you and expect of course, to make the usual division. I think it would be well if you would write me giving your ideas on this subject, and enclosing a bill for services, having in mind the retainer which has already been paid to us and which is subject to adjustment between you and ourselves."

Plaintiff says that considering the time at which this letter was written it furnishes "irrefutable proof" of defendants' agreement for a division of the fees with plaintiff and is a recognition of the fact that their representation of Mrs. Lee came through plaintiff. We think the inferences to be drawn from this letter are not all in favor of plaintiff's contention. If there had been an express agreement between plaintiff and Mr. Hennessy that plaintiff was to receive one-third of defendants' fees there would have been no occasion for the request of Hennessy that plaintiff write, giving his ideas on that subject, nor any occasion for stating that the retainer already received was subject to adjustment. Moreover, as defendants suggest, the letter requests plaintiff to send on his bill for services, indicating that it was defendants' understanding at that time that a joint bill should be rendered to Mrs. Lee for both plaintiff's and defendants' services. Indeed, under all the circumstances, this would seem to have been fair to the respective attorneys and also to Mrs. Lee. The uncontradicted evidence shows that the services performed by defendants required many times the amount of work and care bestowed upon Mrs. Lee's affairs by plaintiff.

It would seem that a fair division of the fees should have been made upon the basis of the services rendered and responsibility assumed. Plaintiff's conduct is not quite consistent with his testimony. If plaintiff's testimony is true he would have been entitled to recover one-third of the \$500 retainer which was paid to defendants. He was advised of the payment of this retainer, as the correspondence shows, on September 21, 1932, but made no demand or request of any kind that the payment be shared with him. He billed Mrs. Lee directly for \$3500, and after he was paid in part sued her for the balance claimed, collecting a total of \$3200. He now asks an additional \$1000 from defendants. The trial court found that he was not entitled to recover this last demand. The finding is entitled in this court to the same weight as the verdict of a jury. Plaintiff cites only one authority - Duryea v. Zimmerman, 143 App. Div. N. Y. 60, 68. The case is not inconsistent with the views herein expressed.

The judgment of the trial court is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

If I could find a fair division of the two parties, I would have been upon the basis of the parties' conduct and responsibility.

Plaintiff's conduct is not quite consistent with his testimony. If Plaintiff's testimony is true, he would have been entitled to recover one-third of the sum retained within the bill in 1930-1931. He was advised of the payment of this retention, as the correspondence shows, on September 11, 1931, but made no demand or request of any kind that the payment be made with him. He billed Mrs. Lee directly for \$200, and stated he was paid in full. He has her for the balance claimed, including a total of \$200. He now seeks an additional \$100 from defendant. The trial court found that he was not entitled to recover this \$100. The finding is upheld in this court to the same extent as the verdict of a jury. Plaintiff shows only one materiality - Plaintiff's testimony. 1st App. Civ. 2. 80, 81. The case is not law-relevant with the views herein expressed.

The judgment of the trial court is affirmed.

WATSON.

O'Connor, J., and Maguire, J., concur.

39521

FRANK BIRGEL, Assignee of
Joseph McDoux and Herman Lannel,
Appellee,

vs.

WILLIAM P. ROE,

Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

292 I.A. 636⁴

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This case was begun before a justice of the peace, by whom judgment was entered against the defendant and in favor of the plaintiff in the sum of \$283.20. Defendant appealed to the Circuit court of Cook county where, upon a trial by the court de novo, a judgment for plaintiff was entered for the sum of \$264.70 on February 25, 1937. This appeal by the defendant followed.

The record discloses that notice of appeal was given plaintiff February 27, 1937, and filed in the Circuit court March 1st; that on March 5th a stipulation was filed that the original bill of exceptions instead of a copy might be incorporated in the record. On the same day defendant gave bond which was approved and praecipe for transcript of record was filed. March 10, 1937, a notice to the attorneys for plaintiff was filed, to which was attached their acknowledgment of service on March 9, 1937. This notice in substance states that on March 10th the attorney for defendant will present to Judge LaBuy of the Circuit court the motion of defendant for leave to file of record nunc pro tunc as of November 6, 1936, a list of exhibits which are specifically described. The record does not disclose that any order was entered by the court pursuant to this motion, other than a continuance of same to April 12th. The record also shows that on March 17, 1937, after defendant filed his notice of appeal, plaintiff filed an appearance in the Circuit court in the appeal proceeding.

FRANK BIRNEY, Assignee of
Joseph B. Birney and others
Appellants,

vs.

WILLIAM F. BIRNEY,
Appellee.

39821A. 39821

1. JOSEPH BIRNEY DECEASED THE ESTATE OF HIS WIFE.

This case was begun before a Justice of the Peace, by whom judgment was entered against the defendant and in favor of the plaintiff in the sum of \$25.00. Judgment was entered to the Circuit Court of Cook County where, upon a trial by the Court and jury, a judgment for plaintiff was entered for the sum of \$25.00 on February 25, 1937. This appeal by the defendant followed. The record discloses that notice of appeal was given plaintiff February 27, 1937, and filed in the Circuit Court March 1st; that on March 1st a stipulation was filed that the original bill of exceptions instead of a copy should be incorporated in the record. On the same day defendant gave bond which was approved and prescribed for transcript of record was filed. March 10, 1937, a notice to the clerk of the Circuit Court was filed, to which was attached their acknowledgment of service on March 7, 1937. This notice in substance stated that on March 10th the defendant's attorney will present to the Circuit Court of Cook County a motion of defendant for leave to file of record FILED FILED of November 6, 1936, a list of exhibits which are specifically described. The record does not disclose what any order was entered by the court pursuant to this motion, other than a continuance of same to April 1st. The record also shows that on March 17, 1937, after defendant filed his motion of appeal, plaintiff filed an appearance in the Circuit Court in the appeal proceedings.

There is no report of proceedings or bill of exceptions, and no brief has been filed in this case in behalf of plaintiff. The brief for defendant states that plaintiffs, as assignees, sued for steam heat furnished in the Village of Steger, Illinois, for a period extending from May, 1929, to May, 1931. There is nothing in the record, however, to warrant these statements. Defendant urges that the Statute of Limitations was a complete defense to all the accounts with the exception of the charge for the last month. He cites Thompson v. Reed, 48 Ill. 118, and Miller v. Cinnamon, 168 Ill. 447. There is no evidence in the record to sustain this contention. Neither this defense nor any other urged can prevail in the absence of a report of the proceedings on which the errors urged would necessarily be based. It follows the judgment of the trial court must be affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

There is no report of proceedings in this case, and no bill was filed in this case in behalf of the plaintiff. The bill for defendant's share was dismissed, as defendant, who was then residing in the village of Oyster, Illinois, for a period extending from May, 1870, to May, 1881. There is nothing in the record, however, to warrant these statements. Defendant argues that the Statute of Limitations was a complete bar to all the accounts with the exception of the account for the last month. He cites Wagon v. Reed, 12 Ill. 118, and Miller v. Gibson, 188 Ill. 447. There is no evidence in the record to sustain this contention. Neither this contention nor any other urged can prevail in the absence of a report of the proceedings on which the errors urged would necessarily be based. It follows that judgment of the trial court must be affirmed.

APPROVED,

O'Connell, J., and Kennedy, J., concur.

39255

THE PRUDENTIAL INSURANCE COMPANY OF
AMERICA, a corporation,

Plaintiff - Appellee,

v.

BESSIE RICHMAN, et al.,

Defendants.

On Appeal of BESSIE RICHMAN, et al.,

Defendants - Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

292 I.A. 637

MR. PRESIDING JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This case has been consolidated with Case No. 39254, in which we have filed an opinion. The facts and circumstances in both cases are similar, and the views expressed in that case are controlling in the instant case.

For the reasons stated in Case Number 39254, the decree is affirmed.

DECREE AFFIRMED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

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39389

KATHERINE MOEFFLING,

Appellant,

v.

STEPHEN REYNOLDS,

Appellee.

SUPERIOR COURT

292 I.A. 637²

COOK COUNTY.

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant to recover for damages alleged to have been sustained by her on the evening of October 21, 1933, as a result of her being struck by defendant's automobile. At the close of plaintiff's case, the court directed the jury to find for the defendant. A verdict of not guilty was returned, upon which judgment was entered against plaintiff for costs.

The undisputed evidence indicates that the accident in question happened at the west crosswalk of 63rd street, running east and west, and Racine Avenue, running north and south, in the city of Chicago. Also, that plaintiff was walking south, that defendant was driving his automobile east, and that the automobile struck the plaintiff when she had arrived at a point in the street between the south rail of the eastbound street car track on 63rd street and the south curb of Racine Avenue.

Charles Eichorst, a witness called on behalf of plaintiff, testified to the effect that about 5:50 in the afternoon of October 21, 1933, he was standing at the southwest corner of 63rd street and Racine Avenue in company with a man named Fred Kalis; that at that time, it was raining - misting; that there was a street light at the southwest corner of the street intersection, and that it was lighted at the time; that there were no stop and go lights at the intersection mentioned; that the scream of a woman attracted his attention, and that at that time, he was facing northwest, and that he looked to the west crosswalk of 63rd Street and Racine Avenue and saw a woman lying in the street, on the south rail; that before he heard the

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woman's scream, he did not hear the sound of an automobile horn; that he made no observation of the traffic on 63rd Street or Racine Avenue; that the woman had with her a small package; that the witness went over to help her, and that two men got out of the car (meaning the automobile involved), picked up the lady who had been knocked down in the street by the automobile, and helped her into a drug store. On cross-examination, this witness stated, in substance, that he, at that time, saw the automobile involved standing there; that when he went over to the woman, she was conscious, but was unable to walk alone and required help, and that the two men from the automobile put her in their car and said they were going to take her home. This witness further testified, to the effect, that at the time of the accident, he was from fifteen to eighteen feet from the point thereof.

Fred Kalis, mentioned by the last named witness, testified for the plaintiff and to the effect that on the evening of the accident, he was engaged in a conversation with Eichorst, and that he, the witness, was facing northeast, and that it was dark and raining; that he heard a woman scream, looked around and saw her lying in the street, just south of the car line and just at the crosswalk. He also stated that he saw the automobile there, and that prior to hearing the woman scream, he had not noticed any other traffic in 63rd Street. On cross-examination, this witness stated that at the time in question, he and Eichorst were standing under a shelter close to the doorway of a drug store; that when he saw the plaintiff, she was about twelve feet north and six feet east of where he was standing, and close to the automobile which was standing still facing east, that the front end of the car at that time was close to the walk, the woman was a little east of the walk, and that it was dark and raining so that he could not tell where the woman was lying, with reference to the front of the automobile.

woman's answer, he did not hear her coming at the automobile door; that
 he made an observation of the position of the car as it moved in relation to the
 fact that the woman had not a small package; that the witness went
 over to this car, and that the man got out of the car (leaving the
 automobile involved), picked up the bag and had been knocked down
 in the street by the automobile, and helped her into a drug store.
 On cross-examination, this witness stated, in substance, that at
 that time, and the automobile involved remained there; that when
 he went over to the woman, the car was stationary, but the woman is still
 alone and standing help, and that the two men and automobile got
 out in their car and said they were going to look for some. This
 witness further testified, to the effect, that at the time of the
 accident, he was from fifteen to eighteen feet from the main doorway.
 (The latter, mentioned by the last named witness, testified
 for the plaintiff and to the effect that on the morning of the
 accident, he was engaged in a conversation with Murphy, and that
 he, the witness, was being notified, and that it was that day
 (which) that he heard a woman scream, looked around and saw her lying
 in the street, just north of her car and just at the opposite
 We also stated that he saw the automobile leave, and that while he
 hearing the woman scream, he did not notice any other parties in the
 street. On cross-examination, this witness stated that at the time
 in question, he and witness were standing under a building across the
 the doorway of a drug store; that when he saw plaintiff, he was
 about twelve feet north and his feet west of where he was standing,
 and close to the automobile which was standing still facing west,
 that the front end of the car of the car of the car was close to the wall,
 the woman was a little east of the car, and that it was that day
 raising as that he could not tell where the woman was lying, with
 reference to the front of the automobile.

Plaintiff testified to the effect that at the time in question, she was a housemaid, and that on the day in question, she left her place of employment at about 4 o'clock in the afternoon and proceeded by street car to the northeast corner of 83rd street and Racine avenue and that she then walked west to the northwest corner and that at that time she had an umbrella, a purse and a small package in her arm; that at no time after she left the street car did she open her umbrella because it was not raining hard enough for that purpose; that it was quite dark and that she did not remember whether there were street lights on the corner; that before she left the northwest corner to go south, she looked to see if there was any traffic coming, and then started south; that before she started, she saw an automobile coming from the west, and that at that time it appeared to be about a block away; that after she left the north sidewalk, she looked west again when she was in the middle of the first track, and that then the automobile appeared to be about a half block away, and that she then started to cross over the remaining distance; that she was then walking fast, and that she was also watching the ground to see where she was stepping, and that she was suddenly hit by the automobile when she was between the south track and the south curb; that she was hit by the right side of the front of the car "a little to the back", and that the next thing she remembered, she was in the drug store, and from there was taken by the defendant to her home, and that shortly thereafter, the doctor arrived and examined her. On cross-examination, she testified to the effect that she was wearing glasses, that her glasses were not wet and that she could see; that when she was standing on the north curb, she looked west and saw two cars coming, that the nearest car was about a block away and had its headlights on; that when she looked the second time, she was between the eastbound and westbound tracks; that she did not stop then, but kept on walking, and that the second time she saw the automobile, it

The first thing I noticed when I stepped out of the car was the cold, crisp air. It felt like a blanket, wrapping around me. I took a deep breath, savoring the scent of pine and the distant sound of water. The road ahead was quiet, the only sound being the soft hum of the engine. I felt a sense of peace, a moment of stillness in a world that was always moving. The sun was low in the sky, casting a warm, golden glow over the landscape. I knew this was a special place, a place where time seemed to stand still. I smiled, feeling a sense of accomplishment and joy. The journey had been long, but it was worth it. I had found what I was looking for.

appeared to be about a half a block away; that she did not notice how fast it was going but that it was going east between the tracks and the south curb; that there was no traffic coming from the east, and that all she saw was two cars coming from the west, and that she hurried all the time from the time she left the curb to cross the street; that she saw the headlights on the automobile as they came close to her, but it was then too late for her to get out of the way, and that she saw it again just before it struck her. She also testified to the effect that it was about four months before she got out of bed, that she was up part of the time before that, and that after the accident, she did not do her work any more.

An X-ray physician who exhibited X-ray films of the plaintiff which were admitted in evidence, testified that five of her ribs showed callus formation, being evidence of fracture; that the films showed evidence of fracture of the sacrum, and also that the films showed that the fractured ribs had healed and were in good alignment. Another physician testified to the effect that there was an irregular alignment of the sacrum, which might be the result of an injury.

In passing upon the court's ruling and its order directing a verdict of not guilty, we call attention to the undisputed evidence in the case, as follows: When plaintiff started to go south across 63rd Street, she noted that the automobile, which afterwards struck her, was a block away and coming towards her, that when she was in the south right-of-way of the street car tracks between the rails, the car was about a half a block away, and that when she reached a point at about half way between the south rail of the eastbound track and the curb, she was struck by the automobile. The rule, as applicable to the situation presented by plaintiff's evidence, is stated in Johnson v. Coey, 237 Ill. 88, as follows:

[illegible][illegible]

the situation presented by Einstein's evidence, it should be known
early, and not stated by the defendant. The rule, as applicable to
about half way between the end of the defendant's case and the
end of a half a clock more, and that when the witness is called in
about right-of-way of the street and there is no rule, for an
hour, and a clock more and nothing towards the end of the case in the
end of the case, the rule is the same, which is the same as the
in the case, as follows: that should be the same as the
a witness of the family, we will discuss for the defendant's evidence
is resting upon the defendant's evidence and the witness's evidence

"The driver of the automobile was bound to use at least reasonable and ordinary care. He was bound to anticipate that he might meet persons or vehicles and to keep a proper lookout for them and use care to have his machine under such control as to enable him to avoid collisions. It was for the jury to say what the rate of speed was; whether it was negligence to approach the street intersection at such rate; whether the driver slackened speed; whether there was a lack of ordinary care in approaching the car without slackening speed."

This case recites the rule as to the duty of the driver of the car, but he offered no evidence to show compliance.

From the evidence before it, the court was not warranted in assuming a want of due care on the part of the plaintiff and absence of negligence by defendant. We are of the opinion that the court should have submitted the case to the jury. Therefore, the court was in error in instructing the jury to find the defendant not guilty. The judgment is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

39469

JOHN J. JOHNSON,

Appellant,

v.

WILLIAM S. HEFFERAN, Individually
and as Trustee, et al.,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

292 I.A. 637³

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

An amended bill of complaint filed in this case on June 12, 1935, shows the following: Prior to October 8, 1928, a foreclosure proceeding had been instituted against certain property owned by plaintiff, a decree had been entered, a sale made, and the period of redemption would expire on October 9, 1928. On October 8, 1928, plaintiff and George C. Adams entered into the following agreement:

"State of Illinois } ss.
County of Cook }

This agreement entered into by and between John J. Johnson, party of the first part and George C. Adams, party of the second part, witnesseth:

That heretofore, a foreclosure proceeding was filed against the said John J. Johnson, and that the period of redemption expires on or about the 9th day of October, 1928, and that said John J. Johnson, being unable to redeem the property commonly known as the Northeast corner of Fifty first Street and Forrestville Avenue and otherwise described as:

Lots One (1) and two (2) in Collins and Morris' Subdivision of part of lots 13, 14 and 15, in Lavinia and Company's Subdivision of the North East Quarter, and in consideration of legal services rendered and to be rendered to the said John J. Johnson, said John J. Johnson hereby agrees that if the said George C. Adams shall effect an arrangement that said property can be redeemed and saved from said foreclosure and afterwards refinanced, said George C. Adams is to have a sum equal to fifty per cent (50%) of said sum or sums that can be realized out of said property.

It is further understood that the title to the said property is to be taken in trust by the Chicago Trust Company for the benefit of the interested parties.

In Witness Whereof, we have set our hands and seals 8th day of October, A. D. 1928.

John J. Johnson (Seal)
George C. Adams (Seal)

Witness:

Steeling Wallace."

[illegible]

This contract was recorded on November 9, 1928, in the office of County Recorder of Cook County.

The bill of complaint contains further allegations to the effect that after the period of redemption had expired, plaintiff entered into a contract with the purchaser at the foreclosure sale, by which the purchaser agreed to reconvey the property to plaintiff for the amount due; that after the contract was entered into between Adams and the plaintiff, it was exhibited to an officer of the Chicago Trust Company and an officer of the Exchange State Bank of Chicago, which latter officer, together with the president of the Exchange State Bank, plaintiff and Adams, viewed the premises in question, after which the president of the Exchange State Bank stated to Adams that he would finance a plan to redeem the property with funds to be furnished by the Exchange State Bank of Chicago, upon the condition, however, that some person, other than the plaintiff, should take title to the property; that Adams would procure such person, and that the person so taking title, should execute promissory notes in the amount of \$50,000.00, together with a mortgage to secure the payment of the notes, that Adams should give his own personal note to the Exchange State Bank of Chicago for \$50,000.00, and that this bank would take the mortgage notes as collateral security for the Adams note; that when such conditions should be fulfilled, then and in that case the Exchange State Bank of Chicago would pay the purchaser at the foreclosure sale, the amount due to him, and would also secure a conveyance of the real estate to a person to be nominated by Adams, this person to take title, and that the person so taking title would then execute a deed in trust to the Chicago Trust Company as further and additional security for the loan, all for the benefit and use of the plaintiff. Further allegations are to the effect that Adams secured one Seigel E. Young as the person to take title to the property, and that on October, 10, 1928, a Master's deed was issued

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THE WILL OF THE PEOPLE

to Young; that on October 10, 1928, Young executed a trust deed to the Chicago Title & Trust Company to secure notes for \$50,000.00; that on October 11, 1928, Young conveyed the property to the Chicago Trust Company by a trust deed, and that this deed in trust was made subject to a certain trust agreement, denominated Trust No. 2419, which latter instrument, plaintiff charges, was made for the sole benefit of the Exchange State Bank of Chicago; that on April 22, 1929, the Chicago Trust Company conveyed the property by deed to one Charles Burleigh, and that on the same date Burleigh executed a certain instrument in and by which he acknowledged that he was holding the title to the real estate mentioned in trust for the Exchange State Bank of Chicago; that on April 29, 1929, Burleigh executed two mortgages, one for \$60,000.00 and one for \$30,000.00, and that the Chicago Title & Trust Company issued a guarantee policy on the property in the sum of \$50,000.00 upon the \$60,000.00 mortgage, and a guarantee policy for \$30,000.00 on the \$30,000.00 mortgage, and that at that time, the property was encumbered with a prior mortgage for \$50,000.00, which, at the time of the filing of the bill, had been paid but had not been cancelled, and that no release of the same had been filed for record. It is further alleged that to secure the note for \$60,000.00, Burleigh conveyed the premises by trust deed to William S. Hefferan, as trustee, and that to secure the note for \$30,000.00, Burleigh conveyed the premises by trust deed to the Chicago Title & Trust Company, and that such latter conveyance was made subject to the prior encumbrance of \$60,000.00; that on January 24, 1930, Burleigh conveyed the real estate involved to William J. Rathje, Receiver of the Exchange State Bank of Chicago, and that Rathje, as receiver, conveyed the premises to Henry R. Otto; that Otto was then an agent and employee of Rathje, and that Otto succeeded Rathje as receiver of the Exchange State Bank of Chicago upon the death of Rathje. It

[illegible]

is further alleged that while Otto was acting as receiver of the bank, he sold the collateral note, together with the remaining security, to William S. Hefferan for \$1,120.00; that the title to the real estate involved was conveyed to one John H. Coogle, husband of Mary Stocker Coogle, secretary to William S. Hefferan, and that the sale of the collateral and the conveyance of the title to the property were made without order of court. It is alleged that Coogle died on December 24, 1934, leaving Mary, his widow, and other heirs at law, who were hereinafter named and shown to have been made defendants. It is further alleged that Adams failed to give plaintiff information that Young took title for plaintiff's benefit, and that plaintiff had no knowledge that an assignment had been made to Young until some time subsequent to such conveyance; that plaintiff did not authorize Adams to cause an assignment to be made to Young, as herein set forth, and that plaintiff had no knowledge that Young had procured the Master's deed to the property; that plaintiff continued to make inquiries of Adams for two years and received no satisfactory explanation of the conditions as to the property involved, and that late in the year 1931, he became distrustful of his attorney and sought other advice. Plaintiff also alleges that on May 21, 1935, he procured from Siegel E. Young, also known as Seigel E. Young, and his wife, Lucille, a quit claim deed bearing date of the 9th day of October, 1928. It is to be noted that the date of delivery of this deed, as alleged, is a date long subsequent to the happening of all of the aforementioned transactions, which, according to the complaint, took place during the latter part of the year 1928 and up to and including January 24, 1930.

The following persons were made defendants: Exchange State Bank of Chicago, George C. Adams, Seigel E. Young, Roscoe H. H. Luckingbill, Lee A. King, Charles J. Burleigh, individually and as trustee of the Exchange State Bank of Chicago, William J. Rathje, Henry R. Otto, individually and as trustee of the Estate of the Exchange State

is further alleged that while said was acting as receiver of the trust, he sold the oil-bearing acre, together with the remaining property, to William E. Hollister for \$1,000,000; that the title to the said estate involved was conveyed to one John E. Gault, deceased at that time, and that the title to the said estate was conveyed to the said William E. Hollister, and that the title to the said estate and the conveyance of the title to the property were made without order of court. It is alleged that Gault died on December 14, 1934, leaving only his widow and other heirs at law, who were thereafter named and shown to have been made defendants. It is further alleged that Gault failed to give adequate instructions that Young had title to the estate's property, and that Gault had no knowledge that in conveying and then made to Young said estate and was conveyed to both conveyed; that Gault had not authorized him to make an assignment to be made to Young, as herein set forth, and that Gault had no knowledge that Young had conveyed the estate's share to the property; that Gault intended to make assignment of the share for two years and received no satisfactory explanation of the conditions as to the property involved, and that later in the year 1931, he became dissatisfied of his attorney and sought other advice. This will also appear from an exp. of 1930, as presented from Young E. Young, also known as Daniel E. Young, and his wife, Louise, a wife claim dated in the date of the exp. of 1930, that it is to be noted that the date of delivery of said deed, as alleged, is a date long subsequent to the recording of all of the aforementioned transactions, which, according to the complaint, took place during the latter part of the year 1930 and up to the following January 11, 1930. The following persons were made defendants: Kenneth E. Galt, John E. Galt, George E. Galt, Daniel E. Young, Louise E. Galt, and A. Clark, George E. Galt, individually and in

Bank of Chicago, and Mary Stocker Cogle, widow of John H. Cogle, Nellie Cogle, Helen Cogle, Minnie Cogle, Frank Cogle and Hettie Cogle Gary, his sisters, heirs of John H. Cogle, William L. O'Connell and William S. Hefferan, individually and as trustees.

The prayer of the bill is that the defendants be required to make a just and true accounting of all the sums of money received by them, or either of them, or by any person for them, from rents, issues and profits of the property described in the contract, from October 9, 1928, and from whom such rents were received, and how they were disbursed. The prayer recites that plaintiff is ready and willing and offers to pay the defendants whatever the court decrees to be due and owing.

The defendants made a motion to strike the complaint upon the ground that it does not state a cause of action against defendants, but that if plaintiff has any claim, it is based on the contract and is against Adams; that all the defendants, other than Adams, are bona fide purchasers without notice; that the complainant is guilty of laches; that all of the allegations as to notice and knowledge are conclusions of the pleader and should be stricken and have no allegation or fact to support them; that they are argumentative, and that the effect of the recording of the agreement between plaintiff and Adams on November 9, 1928, after the deed from the Master to Young and the deed from Young to the Chicago Trust Company on October 11, 1928, placed it outside of the chain of title.

Upon a hearing on the bill and motion to dismiss, the court entered the following order on February 7, 1936:

"It is Hereby Ordered that this cause be and it is hereby dismissed as to said defendants William S. Hefferan, individually and as trustee under the trust deed dated April 23, 1929, and recorded as Document No. 10352064, Mary Cogle, otherwise known as Mary Stocker Cogle, Helen L. Cogle, Nellie Cogle, Minnie Cogle, Frank Cogle, Hettie Gray, Marguerite M. Barrie, Johanna A.

State of Colorado, and Guy Joseph Gaudin, heirs of John E. Gaudin,
William Gaudin, William Gaudin, William Gaudin, heirs of John E. Gaudin,
Georgia Gaudin, the sister, heirs of John E. Gaudin, William E. Gaudin,
and William A. Gaudin, individually and as trustees.

The purpose of the bill is that the following be amended
to read as follows and from receding at all the same of any necessity
by them, or either of them, or by any person for them, their heirs,
lawful assigns and assigns of the property described in the petition, from
October 9, 1938, and from that date until the same be amended, and from that
date forward. The purpose of the bill is that the same be amended
and orders to pay the following amounts the court orders to be paid
and other.

The defendant made a motion to strike the complaint from
the record that it does not state a cause of action against defendant
but that it is insufficient and void, it is held as the answer and
against same; and all the defendant's other claims, and from
this date forward without notice; that the complaint is null and
void; that all of the allegations of the complaint are untrue and
unsubstantiated of the record and cannot be sustained and have no effect
from the date of the filing of the complaint; that the defendant, and from
the date of the filing of the complaint to the date of the filing of the
answer on November 9, 1938, after the date the answer is filed on
the date from time to time the following items Company on October 11, 1938,
placed in custody of the court at that.

Under a hearing on the bill and order to dissolve, the court
entered the following order on January 7, 1938:

It is hereby ordered that this cause be and it is hereby
dismissed as to said defendant William E. Gaudin, individually
and as trustee under the trust dated April 22, 1938, and
as to defendant Guy Joseph Gaudin, William E. Gaudin, William E. Gaudin,
Georgia Gaudin, William E. Gaudin, William E. Gaudin, William E. Gaudin,
and William A. Gaudin, individually and as trustees.

Hiterman, Clara E. Hawk, as conservatrix of the estate of Margaret Johnson, insane, and Bridget H. Sullivan, in her various capacities as guardian of the estate of Ruth Anglin, a minor, as conservatrix of the estate of Augusta Kratlow, insane, as conservatrix of the estate of Mary Hoff, insane, as administratrix of the estate of Jacob Kuebler, deceased, and as conservatrix of the estate of Bertha Fuegel, insane, and that they have a decree against plaintiff for their costs in this cause.

Enter:

Stanley H. Klarkowski, Judge."

The appeal is from this order.

The only defendants named in the bill are those hereinbefore referred to, and all those charged with having been parties to an alleged plan to defraud plaintiff, except William S. Hefferan, and those holding through him, are still in court. The only charge against Hefferan is that "Mr. Hefferan, trustee in the \$60,000.00 mortgage, did know, or could have known, from the transactions and conveyances by and between the respective parties with reference to the premises and concerning the premises hereinbefore described, the interest of the plaintiff." Plaintiff does not state one fact which indicates that Hefferan was not entirely innocent of any claim or right of plaintiff when he took title as trustee. If plaintiff has stated a cause of action against the remaining defendants, he still has it.

We are of the opinion that the appeal is entirely without merit, and that the judgment of the Circuit Court of Cook County should be and it is affirmed.

AFFIRMED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

39392

ALBERT B. STEINDLER,

Plaintiff and Respondent below,

Appellee,

vs.

HENRY J. KNIES, et al, Defendants
below,

On Appeal of HENRY J. KNIES,

Petitioner below,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

292 T A. 6374

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

Henry J. Knies, petitioner, brings this appeal from an order entered in the Circuit Court in a foreclosure suit, wherein the court found that said petitioner was not entitled to the relief prayed for in his petition.

The evidence shows that during the year 1928, Albert B. Steindler, respondent and appellee herein, became the owner of a series of notes totaling \$30,000.00, executed by Henry J. Knies, petitioner and appellant here, and his wife, and secured a trust deed on the property located at 10112-25 South Western Avenue, Chicago, Illinois; that in the Spring of 1933 the entire note issue had matured and remained unpaid and the taxes were delinquent in a sum of approximately \$8,000.00; that an agreement was entered into by the parties and their counsel which provided in substance that Steindler was to foreclose his trust deed and that subject to the approval of the court one Leo Altholz, in the employ of Albert Steindler, was to be appointed receiver to act without compensation, and was to enter into a lease for the premises with Henry Knies at a rental of \$150 per month, that being the agreed fair value for the occupation of said premises. No defense was interposed to the complaint for foreclosure.

The agreement further was that at any time within two years from August 1, 1933, Knies might reacquire his property free and clear of all liens and encumbrances by the payment of \$15,000.00 cash plus

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Other entries in the report are as follows:

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prayed for in his devotion.

The evidence shows that during the time that the witness was in the room, the witness saw the defendant and the defendant was in the room.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

Series of notes dated 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 263

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ON 10/10/1964, THE FOLLOWING INFORMATION WAS RECEIVED FROM THE NEW YORK OFFICE OF THE FBI:

Illustrated book in two parts by I. J. ...

and several other things which will not be mentioned here.

THEY ARE IN THE OFFICE OF THE ATTORNEY GENERAL

and their current work projects is considered that was

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APPROVED FOR RELEASE BY NSA ON 08-10-2013 pursuant to E.O. 13526, 6 FR 35425, July 26, 2001

THEY WILL BE INTERESTED IN THE RESULTS OF THE RESEARCH AND WILL BE ABLE TO USE THE RESULTS IN THEIR OWN RESEARCH.

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THE UNIVERSITY OF CHICAGO

attorney's fees, court costs, and such other additional moneys which plaintiff might advance for taxes in the interim, with interest at six per cent per annum from and after August 1, 1933. The option granted to the appellant Knies was further conditioned upon his prompt and faithful performance under the lease to be granted him by the receiver.

The evidence further shows that foreclosure proceedings were instituted, Leo Altholz appointed receiver and the agreed lease entered into, all pursuant to the order of court; that Mr. Knies paid rent to the receiver for approximately one and one-half years and then went into default; that a petition was filed on behalf of the receiver after approximately five months' rent had accrued and remained unpaid, seeking the issuance of a writ of assistance against Mr. Knies; that at Mr. Knies request a hearing on the petition was continued from time to time and periodic payments of rent were made as a further inducement for the continuances; that in August, 1935, on a continued hearing on the receiver's petition Mr. Knies and his counsel advised the court that further performance under the lease was impossible and asked to vacate the premises; that an order was entered for the issuance of a writ of assistance, to be effective September 3, 1935.

The evidence further shows that after the service of the writ of assistance, Mr. Knies reopened negotiations for continued occupation of the premises and it was agreed between petitioner and appellee with consent of the court that he was to pay \$75 per month throughout the remainder of the receivership; that after making one payment he failed and refused to make any further payments; that the period of redemption expired on February 28, 1936, and on February 27, 1936, he filed the petition which is now before us in this cause, the substance of which he alleges as follows:

That he borrowed \$30,000.00 from complainant; that in addition to these improvements on the premises he installed equipment

for the repair of automobiles, and until the latter part of the year 1928, enjoyed a prosperous business; that during the year 1928 there occurred an industrial and economic upheaval in the form of flight of credit, collapse of banking institutions, widespread unemployment, restrictions of purchases because of greatly reduced currency and purchasing power; that during the year 1930 the depression had not abated and petitioner and plaintiff conferred with respect to the protection of said property; that it was agreed with the consent of defendant that plaintiff should build living quarters for himself and family in said garage building, which was done; that plaintiff suggested that there being an unpaid balance of \$4100 on a junior mortgage trust deed on the premises that a friendly foreclosure suit be instituted and defendant gave to petitioner a letter naming the \$15,000 figure for purchase and did not interpose any defense and did not appear at the hearing in the trial court; that during the months of April and May, 1935, petitioner and appellee further conferred respecting the living quarters and alterations were made at an expense of about \$900 which petitioner paid; that on February 21, 1936, with the master's deed impending and the period of redemption coming to a termination, plaintiff became noncommittal and aloof and "plaintiff has announced that he will insist upon possession of the premises and will dispossess petitioner of his business and petitioner's family of their living quarters; that petitioner further states that the law and the courts take cognizance of the aforesaid financial depression and that the Congress has by various enactments sought to alleviate the innumerable inequities and inequalities and social injustices occasioned by the unforeseen upset of the economic structure of the nation, and among the various enactments it has promulgated a law as part of the bankruptcy act, known as Section 74B, enabling a debtor confronted with foreclosure and loss of his property during the flight of the real estate market, to defer his obligations; that said measure was

for the year of submission, and until the latter part of the year 1908, enjoyed a prosperous business; and during the year 1908 there occurred an industrial and economic depression in the form of strike at steel, collapse of housing market, extremely unfavorable conditions of business, and a general reduction of activity in the manufacturing industry; and during the year 1909 the depression had not abated and continued and actually worsened with respect to the production of goods; and it was agreed with the consent of the defendant that plaintiff should bring living evidence for himself and family as well as other witnesses, and that plaintiff should first bring an affidavit before the court as a living witness that he had the means that a friendly conversation with the defendant and defendant had no further interest in the business of the plaintiff for business and did not interfere with defendant and his son's business of the plaintiff in the steel industry; and during the year of April and May, 1908, plaintiff and defendant further conducted business in the living business and defendant was not at all engaged in it; and plaintiff said that in January, 1908, with the defendant, and the period of plaintiff's business as a defendant, plaintiff began defendant and plaintiff and plaintiff had business and he will limit upon production of his business and all business of his business and defendant's family of their family business; but defendant further stated that the law had the same effect as the plaintiff's financial condition and that the defendant had by virtue of his business to provide the necessary living and industrial and social justice provided by the defendant and the economic condition of the nation, and would the various witnesses in the defendant's law of part of the defendant and family as living witnesses and other witnesses with defendant and law of the property during the trial of the trial estate matter, so that the defendant; that said matter was

available to petitioner in his protection, but that petitioner forbear to avail himself of said benign legislation in view of plaintiff's undertaking to afford a remedy to petitioner in lieu thereof; all of which plaintiff now seeks to violate to the great loss of petitioner.

Petitioner therefore prays as follows:

"(a) That the decree herein be vacated and set aside, on the ground of fraud;

(b) That plaintiff be enjoined by the order of this court from obtaining a Master's Deed to the said premises;

(c) That a decree in the nature of specific performance be entered, compelling plaintiff to perform the agreements and undertakings as by him pledged;

(d) That hearings herein shall be reopened and petitioner be permitted to interpose his defense, or to proceed to his remedy under the laws affording same, in this court, or in the courts of the United States, under Section 74 of the bankruptcy act;

(e) That said remedies be made open to petitioner, either cumulatively or in the alternative; it being the intention of petitioner, to do equity and he does hereby offer and tender to pay such sums as the court may find to be equitable; and to do any and all things required of petitioner;

And that petitioner may have such further remedy as to the court may seem necessary and equitable."

An answer was filed to said petition denying the allegations of facts contained therein and stated that during the month of August, 1935, after a full and complete hearing before the court, the petitioner advised the court that he was unable to pay the rent and asked that he be given a reasonable opportunity to move, whereupon an order was entered by the court, granting to Leo Altholz, receiver a writ of assistance to be issued September 3, 1935.

The answer further denies that any injustice was done to defendant as he had been given a full opportunity to redeem the property, in foreclosure which he failed to do.

The master found that the allegations set forth in the petition were not true and that the equities were with the appellee, which report was affirmed by the court.

Whatever agreement existed between the parties herein relative to the foreclosure of the property was contained in the letters of August 17, 1933 and September 25, 1933, together with the lease

available to petitioner in his profession, but that petitioner's
in itself of said design information in view of petitioner's
undertaking to afford a remedy to petitioner in his profession; all of
which finally was held to violate the first law of petitioner.

Petitioner therefore prays as follows:

- (a) That the court should be pleased and not refuse,
on the ground of fraud;
- (b) That petitioner be enjoined by the court to take
certain steps containing a request, a demand for the said proceeds;
- (c) That a decree in the nature of a declaratory judgment
be entered, compelling petitioner to restore the proceeds and
understand as of this day;
- (d) That petitioner should be pleased and not refuse,
to be satisfied in interest and balance, as to interest in his property
which has been withheld from him, in the amount of the proceeds of
the said proceeds, under Section 17 of the common law;
- (e) That this petition be made with its petition, either
summarily or in the alternative; it being the intention of
petitioner, to be ready and to have ready after and want to
pay such sum as the court may find to be reasonable; and to do any
and all things required of petitioner;
- and that petitioner may have such further remedy as he
the court may deem necessary and reasonable.

An answer was filed to said petition denying the allegations
of fraud contained therein and stated that before the month of January
1921, after a full and complete hearing before the court, the petitioner
admitted the facts that he was entitled to pay the sum and asked that
he given a reasonable opportunity to pay, petitioner in order was
ordered by the court, granting to the petitioner, petitioner a writ of
certiorari to be issued by the court, September 7, 1921.

The answer further states that any injunctive was done by
petitioner as he had been given a full opportunity to restore the
property, in consideration where he failed to do.

The answer found that the allegations set forth in the
petition were not true and that the petitioner was also a defaulter,
which report was returned by the court.

Respective arguments related between the parties herein before
to the maintenance of the property was contained in the letters of
August 14, 1921 and September 14, 1921, together with the issues

accompanying the same. Unfortunately, appellant has not seen fit to abstract these documents and argues the case as though they are nonexistent.

We have gone over the abstract and briefs very carefully, but fail to find where any injustice has been done to petitioner. He owned the premises on which there was a \$30,000.00 mortgage and after negotiations with appellee the latter agreed to take \$15,000.00 in settlement and further agreed to let him return into the premises if he paid the rent. There was a second mortgage on the premises and appellee desired to clear the title and commenced foreclosure proceedings with the consent of the appellant, which the latter now refers to as a "friendly foreclosure and receivership"; that a receiver was appointed to collect the income. A decree of foreclosure was entered, a sale had and the property purchased on behalf of the plaintiff. On the day before the period of redemption expired this petition was filed on behalf of appellant, making rather indefinite charges which are not supported by any evidence nor do such charges show that petitioner has been wrongfully injured or denied any equities that he is entitled to receive.

The substance of the relief asked is that the mortgage be set aside and that the petitioner be permitted to file a petition in bankruptcy in the United States Court as provided by section 74B but no offer is made to pay the indebtedness that is due and owing to plaintiff. Appellee was apparently willing to take 50 per cent of the value of his mortgage notes and settle for \$15,000.00 instead of the original \$30,000.00 value and petitioner agreed to this, but failed to keep his agreement to pay the principal and interest, or the taxes, or the rental for the use and occupancy of the building all of which amounts to many thousands of dollars and which are due and unpaid.

We are of the opinion that the Circuit Court was correct in its decision and the order of that court is hereby affirmed.

ORDER AFFIRMED.

HEBEL, P.J. AND HALL, J. CONCUR.

to protect these interests and to ensure that the

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are not supported by any evidence nor do such charges have any
basis in fact. The charges are entirely unfounded and are
not supported by any evidence.

is entitled to receive

any thousands of dollars and which was the only

the decision was made by the committee.

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39438

VINCENT G. CALLAGHAN,
Appellant,

v.

CITY OF CHICAGO, a
municipal corporation,
Appellee.

APPEALS FROM MUNICIPAL
COURT OF CHICAGO.

39439

JOHN M. MURPHY,
Appellant,

v.

CITY OF CHICAGO, a
municipal corporation,
Appellee.

CONSOLIDATED CAUSES.

292 I.A. 638¹

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

In the annual appropriation ordinance for the year 1931 the city council of Chicago appropriated for the position of senior clerk then occupied by plaintiff, Vincent G. Callaghan, the sum of \$2,120 per annum. Due to the retrenchment policy employed by the city officials, Callaghan was laid off August 14, 1931. He thereupon filed a suit in assumpsit in the municipal court seeking to recover \$800.74, his salary for the period from August 14, 1931, to December 31, 1931, the end of the calendar and fiscal year. The court sustained the city's motion to strike plaintiff's statement of claim, dismissed the action and entered judgment against Callaghan for costs. This appeal followed.

In cause No. 39439, which is consolidated with No. 39438

30433

VINCENT G. CALLAHAN,
Appellant,

v.

CITY OF CHICAGO, a
Municipal corporation,
Appellee.

30433

JOHN M. KEENE,
Appellant,

v.

CITY OF CHICAGO, a
Municipal corporation,
Appellee.

MR. JUSTICE TUNNEY FOR THE
COURT, AND THE CHIEF OF THE COURT.

In the annual appropriation ordinance for the year 1931 the city council of Chicago appropriated for the position of senior clerk then occupied by Plaintiff, Vincent G. Callahan, the sum of \$2,120 per annum. Due to the retirement policy employed by the city officials, Callahan was laid off August 1, 1931. He thereupon filed a suit in the municipal court seeking to recover \$200.00, his salary for the period from August 1, 1931, to December 31, 1931, the end of the calendar and fiscal year. The court sustained the city's motion to dismiss Plaintiff's statement of claim, dismissed the action and entered judgment against Callahan for costs. This appeal followed.

In case No. 2883, which is consolidated with No. 2883

on appeal, John M. Murphy brought a like action against the city in the sum of \$1,708.53 for salary claimed to be due him under an appropriation by the city council for the position of Bureau Chief of Inspection Service, at \$4,600 per annum, for the period from August 17, 1931, the date on which he contends he was illegally laid off, to December 31, 1931. With the exception of the title and duties of employment and the amounts appropriated for the respective positions, both actions are similar. The court likewise sustained the city's motion to strike Murphy's statement of claim, dismissed the action and entered judgment against plaintiff for costs, from which Murphy also appealed.

The statements of claim filed by the respective plaintiffs set forth the existence and creation of the City of Chicago as a municipal corporation, the establishment of the civil service commission and the adoption of rules and regulations therefor, the creation of the respective positions of Vincent G. Callaghan, as senior clerk, and John M. Murphy, as Bureau Chief of Inspection Service, and the qualifying of both plaintiffs through examination and certification as civil service employees to their respective positions. As to Callaghan it is alleged that he continued in the position until August 14, 1931, and as to Murphy the date is fixed as August 17, 1931. It is alleged that the city council appropriated for both of said positions for the calendar year 1931 their respective salaries, that the appropriation ordinance was not amended at any time, and that in and by the appropriation the council created these positions for the calendar year 1931; that on the dates named plaintiffs were laid off from their positions by their respective department heads, the reason assigned being that their positions had been abolished by the city council on recommendation of the department heads; that the positions of plaintiffs, having been properly

on appeal, John M. Murphy brought a like action against the city in the sum of \$1,708.53 for salary claimed to be due under an appropriation by the city council for the position of Bureau Chief of Inspection Service, at \$1,500 per annum, for the period from August 17, 1931, the date on which he contends he was illegally laid off, to December 31, 1931. With the exception of the title and duties of employment and the amounts appropriated for the respective positions, both actions are similar. The court likewise sustained the city's motion to strike Murphy's statement of claim, dismissed the action and entered judgment against plaintiff for costs, from which Murphy also appealed.

The statements of claim filed by the respective plaintiffs set forth the existence and creation of the City of Chicago as a municipal corporation, the establishment of the civil service commission and the adoption of rules and regulations therefor, the creation of the respective positions of Vincent G. Callahan, as senior clerk, and John M. Murphy, as Bureau Chief of Inspection Service, and the qualifying of both plaintiffs through examination and certification as civil service employees to their respective positions. As to Callahan it is alleged that he continued in the position until August 14, 1931, and as to Murphy the date is fixed as August 17, 1931. It is alleged that the city council appointed for both of said positions for the calendar year 1931 their respective salaries, that the appropriation ordinance was not amended at any time, and that in and by the appropriation the council created those positions for the calendar year 1931; that on the dates named plaintiffs were laid off from their positions by their respective permanent heads, the reason being that their positions had been abolished by the city council on recommendation of the permanent heads; that the positions of plaintiffs, having been properly

created and appropriation made therefor by the city council as provided for in the statutes, the city council was without authority or warrant of law to abolish them and that they were entitled to be retained in their positions for the entire period of the calendar year 1931. Plaintiffs allege that they were at all times ready and willing to perform the duties of their positions from the dates of their layoffs to December 31, 1931, but that the city refused to permit them to do so and to pay their compensation; that the appropriations remain unexpended and on hand in possession of defendant, and they ask judgments in the respective amounts claimed.

The motions of the city to strike the statements of claim are substantially the same in both cases and specify the following grounds:

1. That plaintiffs are guilty of laches.

2. That plaintiffs seek to recover salary, without first having established their legal right to the positions.

3. That the statements of claim do not show a clear right to relief.

4. That the allegations by which it is claimed that the appropriation of the city council created the positions of plaintiffs for the calendar year 1931 constitute an erroneous conclusion.

5. That the statements of claim failed to show that plaintiffs rendered services to the City for the period in question.

6. That plaintiffs have not shown by their statements of claim that the salaries have not been paid to other employees during the period for which they sue.

7. That no showing is made that the appropriation has not lapsed.

8. That the statements of claim ignore the fact that a department head has the authority to reduce the force in his department whenever it becomes necessary, through lack of work or funds, or for other cause, and that it is discretionary with him to leave positions vacant in the interest of economy where the non-filling of such vacancies does not unreasonably impair the service of the department or the safety of the public.

Various points are urged by plaintiffs as ground for reversal, but the principal question involved is whether they may sue in assumpsit for salaries claimed to be due them under the

circumstances alleged in their statements of claim, without first showing the legal existence of their respective positions and their right to hold said positions and receive the emoluments thereof.

Sec. 29, par. 714, of the Civil Service Act (chap. 24, Illinois State Bar Stats., 1935, p. 502) provides:

"No accounting or auditing officer shall allow the claim of any public officer for services of any deputy or other person employed in the public service in violation of the provisions of this Act."

Sec. 31, par. 716, of the same act provides (p. 502):

"No comptroller or other auditing officer of a city which has adopted this Act shall approve the payment of, or be in any manner concerned in paying any salary or wages to any person for services as an officer or employee of such city, unless such person is occupying an office or place of employment according to the provisions of law and is entitled to payment therefor." (Italics ours.)

Sec. 32, par. 717, provides (p. 502):

"No paymaster, treasurer, or other officer or agent of a city which has adopted this Act shall wilfully pay, or be in any manner concerned in paying any person any salary or wages for services as an officer or employee of such city, unless such person is occupying an office or place of employment, according to the provisions of law and is entitled to payment therefor." (Italics ours.)

It thus appears from the foregoing sections of the Civil Service Act that the disbursing officers of the city have no authority, and in fact it would be a violation of their oaths of office to pay plaintiffs before a legal determination of their right to the positions. The question of whether such rights can be adjudicated in an assumpsit suit has frequently been considered by the courts of this state.

In Bullis v. City of Chicago, 235 Ill. 472, plaintiff, a police patrolman who was suspended by the chief of police pursuant to charges lodged against him with the civil service commission, demanded the salary of his position during the suspension period. Before starting suit for salary he had successfully prosecuted certiorari proceedings and secured reinstatement. In discussing the claim for salary, the court said (p. 474):

circumstances alleged in their statements of claim, without first showing the facts existence of their respective positions and their right to hold said positions and receive the emoluments thereof.

Sec. 29, par. VII, of the Civil Service Act (chap. 24,

Illinois State Bar Association, 1935, p. 100) provides:

"No accounting or audit shall allow the claim of any public officer for services of any deputy or other person employed in the public service in violation of the provisions of this Act."

Sec. 31, par. VII, of the same act provides (p. 100):

"No compensation or other emolument of a city which has adopted this act shall be paid to any person in any manner concerned in paying any salary or wages for services as an officer or employee of such city, unless such person is occupying an office or place of employment according to the provisions of law and is entitled to payment therefor." (Illinois laws.)

Sec. 32, par. VII, provides (p. 101):

"No paymaster, treasurer, or other officer or agent of a city which has adopted this act shall willfully pay, or be in any manner concerned in paying any salary or wages for services as an officer or employee of such city, unless such person is occupying an office or place of employment according to the provisions of law and is entitled to payment therefor." (Illinois laws.)

It thus appears from the foregoing recitals of the Civil Service Act that the disbursing officers of the city have no authority, and in fact it would be a violation of their oath of office to pay plaintiffs before a legal determination of their right to the positions. The question of whether such rights can be adjusted in an administrative suit has repeatedly been considered by the courts of this state.

In Julius v. City of Chicago, 235 Ill. 175, plaintiff, a

police patrolman who was suspended by the chief of police pursuant to charges lodged against him with the civil service commission, demanded the salary of his position during the suspension period. Before stating suit for salary he had successfully prosecuted contempt proceedings and secured reinstatement. In discussing

the claim for salary, the court said (p. 174):

"The appellee by his suit was demanding the salary of the office of police patrolman, and it was therefore incumbent on him to show the legal existence of the office and his legal right to hold it. (Stott v. City of Chicago, 205 Ill. 281; People v. City of Chicago, 210 id. 479; McNeill v. City of Chicago, 212 id. 481; Moon v. Mayor, 214 id. 40; Kenneally v. City of Chicago, 220 id. 485.)"

In Stott v. City of Chicago, 205 Ill. 281, cited in the Bullis case, supra, mandamus proceedings were instituted to compel reinstatement of relator's name on the police payrolls of the city "to the end that petitioner might draw the pay of a police patrolman." In discussing the question under consideration the court said (p. 286):

"According to appellant's own contention, the main purpose of his application for the writ is to entitle him to receive or enforce the payment of his compensation."

It was then held that in order to recover compensation it was necessary to allege and prove plaintiff's right to the office and since he failed to do so judgment entered in favor of the city was affirmed.

Following the Stott case a mandamus proceeding was instituted in People v. City of Chicago, 210 Ill. 479, by which it was sought to compel the city to pay salary to petitioner. It was there said (p. 481):

"As appellant is demanding the compensation or salary of an alleged office and as an officer, he must show not only the legal existence of the office, but his clear legal right to hold the same and to receive the emoluments thereof, to entitle him to the writ prayed."

Subsequently, in People v. Coffin, 282 Ill. 599, a mandamus proceeding was brought for reinstatement of petitioner and payment of salary. Upon the question here involved the court said (p. 613):

*** the main question involved was the right of the relator to be restored to the position in question, and the order restoring him carried with it the right to the salary or compensation attached to such position ***.

In Davis v. City of Mount Vernon, 271 Ill. App. 565, plaintiff obtained judgment against the city of Mount Vernon on his suit in assumpsit to recover salary as a policeman. He was appointed a

policeman in May, 1931, gave bond, took the oath of office and was paid for the period to November 15, 1931. Shortly prior to the last mentioned date the city council adopted a resolution directing the mayor to drop a number of employees, including two policemen, because of inability of the city to pay them. The mayor discharged plaintiff as of November 15 and delivered to the city clerk a written statement of his action, giving as his reason the lack of city funds to pay those removed. Plaintiff did not appeal to the city council nor did he take any steps to assert a further right to the position. Neither did he serve as policeman after November 15, 1931. Upon trial plaintiff argued that by the ordinance of the city he was the holder of a city office as distinguished from an employee, so that he held for a term of two years; that no power to remove him existed in the mayor except for misconduct and that since he was not charged with misconduct his removal was a nullity, entitling him to sue in assumpsit for salary accruing for the term of his office and the emoluments thereof. The court held, however, that his removal by the mayor could not be treated as a nullity; that he had the right to apply to the city council for restoration to his office; that he could have proceeded to establish his right to hold the office; that his removal and the reason for it was shown by public records; but that he did nothing. The court said that he was required to establish his right to the office "by litigation or otherwise," before he could recover salary, citing City of Chicago v. People ex rel. Gray, 210 Ill. 84; Gersch v. City of Chicago, 192 Ill. App. 190; Michels v. McCarty, 196 Ill. App. 493.

In Gersch v. City of Chicago, 192 Ill. App. 190, cited in Davis v. City of Mount Vernon, supra, the court said (p. 192):

"That an officer of the police force wrongfully discharged cannot recover his pay accruing, as he claims, after his discharge, while he 'stands discharged,' but must first secure his reinstatement."

ment by appropriate litigation or otherwise, is a proposition directly laid down by our Supreme Court in City of Chicago v. People ex rel. Gray, 210 Ill. 84."

In the Gray case (210 Ill. 84) the court characterized the petition there filed as obnoxious to a demurrer because it sought two kinds of relief, one of which must be obtained before there could be a clear legal right to the other, and said (p. 89):

"Relator stood discharged from the police force of the City of Chicago. Until he was reinstated, and his name restored to the roll he was not, under any circumstances, entitled to maintain mandamus requiring the city or its officers to pay him. If the facts averred by the petition are true, relator was entitled to be reinstated, and the question of his right to the salary could then be litigated; but it is manifest that a reinstatement must precede any attempt to collect the salary by mandamus."

From the foregoing decision it seems to be the settled rule in this state that reinstatement to office by mandamus or otherwise is a condition precedent to a suit for salary, and until the legal existence of the office and the right of plaintiffs to hold the same and to receive the emoluments thereof are established through proper legal proceedings assumpsit will not lie.

Since the various other points urged by plaintiffs do not relieve them from the necessity of first being reinstated it will serve no useful purpose to discuss them. We are of the opinion that the court properly sustained the city's motion to strike the statements of claim in both of these cases. The judgments of the municipal court are affirmed.

JUDGMENTS AFFIRMED.

Scanlan and Sullivan, JJ., concur.

ment by appropriate legislation or otherwise, in a proposition
directly laid down by our laws in the City of Chicago, v.
People ex rel., 120 Ill. 329.

In the first case (120 Ill. 329) the court considered the

petition that filed an ordinance to a committee because it sought

the kind of relief, one of which must be obtained before there could

be a clear legal right to the other, and said (p. 33):

"Relief from the police force of the City
of Chicago. Until he was reinstated, and his name restored to the
roll he was not, under any circumstances, entitled to reinstatement
maintaining the City or the officers to any injury. It is the
facta covered by the petition for relief, relief for the City, which
reinstated, and the question of his right to the relief could then
be litigated; but it is manifest that a reinstatement would be made
any attempt to collect the salary by mandamus."

From the foregoing it seems to be the correct rule in

this case that reinstatement is effected by mandamus or otherwise is a

condition precedent to a writ for salary, and until the legal authority

of the office and the right of reinstatement is held the same rule to be

apply the mandamus should be established from a proper legal point

cedings mandamus will not lie.

Since the various other points urged by defendant do not

have them from the necessity of first being reinstated it will have

no useful purpose to discuss them. We are of the opinion that the

court properly sustained the city's motion to strike the statement of

claim in both of the causes. The judgment of the municipal court

are affirmed.

JUDGMENTS AFFIRMED.

CLARENCE M. BELL, J., CONCURS.

39439

JOHN M. MURPHY,
Appellant,

v.

CITY OF CHICAGO, a
municipal corporation,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

292 I.A. 638²

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

This case is similar to the cause entitled Callaghan v. City of Chicago, No. 39438, in which an opinion has this day been filed. The allegations of the statements of claim are practically identical, except as to names of the plaintiffs and the amounts claimed. One brief was filed by plaintiffs after the two causes were consolidated in this court, and the ground urged for reversal of the judgment against Murphy in this case is the same as in the Callaghan case.

For the reasons stated in Callaghan v. City of Chicago, No. 39438, the judgment of the municipal court in this cause is affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

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39490

ELSIE L. ROBERTS, administratrix
of the estate of Harold M. Roberts,
deceased,

Appellant,

v.

MRS. JAMES (Annette) GALLOWAY,
Appellee.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

292 I.A. 638⁵

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

Harold M. Roberts was killed in an automobile accident on the outskirts of Park Ridge, Illinois, March 13, 1934. His widow, Elsie L. Roberts, as administratrix of the estate and on behalf of his next of kin, brought an action under the Injuries act to recover damages of \$10,000. In count one of the complaint she charged that the defendant's negligence in the operation of her automobile was the proximate cause of the accident; that defendant violated the statute which provides that no driver of a motor vehicle shall suddenly turn without signalling with outstretched arm to those following closely in the rear; and that she also violated the ordinance of Park Ridge providing that no driver of a motor vehicle should suddenly turn without giving suitable signal. Count two of the complaint charged willful and wanton misconduct. Defendant's answer was in the nature of a general denial. On motion of defendant, and over plaintiff's objection, the court withdrew the willful and wanton count from the jury, leaving only the charge of negligence. The jury returned a verdict of not guilty under the negligence count, and after overruling motions for a new trial and in arrest of judgment the court entered judg-

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ment on the verdict, and this appeal followed.

The essential facts disclose that the accident occurred on the Northwest highway within the city limits, but about a mile northeast of the business district of the city of Park Ridge. Northwest highway at the place in question runs northwest and southeast and is paved as a forty foot concrete roadway, divided into four traffic lanes. Shortly after noon on the day in question Roberts had driven his Chevrolet 4-door 1930 model sedan to the Maine Township High School, about two and one-half miles Northwest of Park Ridge, where he picked up his son, Fred Roberts, and two other high school students named Henry Auer and William Wedel, Jr. They then started for Park Ridge, deceased being at the wheel, his son Fred beside him in the front seat, and the two other boys in the rear. They drove south on Potter road to the Northwest Highway and then turned southeast, travelling in the inner traffic lane for some distance. Defendant was driving her car along the inner lane of the Northwest highway, and in the same direction, at the rate of approximately 15 to 20 miles an hour, quite some distance ahead of Roberts' car. As the two automobiles approached the site of the accident, defendant observed Roberts' car through her rear view mirror about one block to the rear. Shortly thereafter, when deceased's car was still one-half or three-quarters of a block behind defendant's car, Roberts crossed over to the curb, or outer lane, and, according to the testimony of his son, Fred, was proceeding in that lane at approximately 40 miles an hour. He was rapidly approaching defendant's car and evidently intended to pass her on the right, but just before he was about to pass, defendant turned into the curb, or outer lane. Roberts jammed on the brakes, skidded off the concrete pavement onto the soft dirt shoulder to the right of the road and struck a telephone or telegraph pole, incurring

went on the veranda, and this aspect follows.

The material facts disclose that the accident occurred

on the northern highway within the city limits, but about a mile
northwest of the business district of the city of Los Angeles.

Northwest Highway at the place is paved with macadam and

concrete and is paved as a four-lane concrete roadway, divided

into four traffic lanes. Usually after noon on the day in question

Robert had driven his Chevrolet four-door sedan to the

Maine Township High School, No. 2, and one-half mile northwest

of Park Ridge, where he picked up his son, Fred Robert, and two

other high school students named Jerry and William Wood, Jr.

They then started for Park Ridge, descended behind of the school, and

soon tried to ride him in the front seat, and the two other boys in

the rear. They drove south on Foster Road to the intersection of

and then turned southeast, traveling in the inner traffic lane for

some distance. Robert was driving his car along the inner lane

of the Northwest Highway, and in the same direction, at the rate

of approximately 15 to 20 miles an hour, until some distance west

of Foster's car. At the two-mile point approximately the side of the

accident, defendant observed Robert's car when it had just

mirror about one block to the rear. He saw it, he said, when

defendant's car was still one-half or three-quarters of a block

behind defendant's car, Robert turned over to the right, or

left, and, according to the testimony of his son, Fred, was

driving in the lane at approximately 15 miles an hour. He was

approaching defendant's car and defendant intended to pass him

the right, but just before he was about to pass, defendant's

into the crowd, or over fence. Robert turned at the same time, and

off the concrete pavement into the soft dirt shoulder in the right

of the road and struck a telephone or telegraph pole, overturning

injuries from which he died shortly thereafter.

Defendant contends and testified that she made the right turn gradually when deceased's car was still a block behind her, and that the first she knew of the accident was when she heard the impact of Roberts' car against the telephone post. Fred Roberts, sitting in the front seat of his father's car, testified that defendant turned over to the right sharply and suddenly, without signalling or giving any warning, and that she was then only twenty-five or thirty feet ahead of Roberts' car. The evidence is undisputed that the day was clear, the pavement dry and substantially no other traffic on the highway.

The willful and wanton count of the complaint reads as follows: "with a conscious indifference and disregard to the surrounding circumstances and conditions and with entire absence of care for the life, person and property of the deceased, without any signal whatever with the outstretched arm or sufficiently otherwise as aforesaid, in violation of the statute as aforesaid," defendant "did then and there suddenly, willfully, wantonly, recklessly and maliciously, drive her automobile to her right from the said inner lane to the said outer lane of said Highway in such a position that deceased by the exercise of ordinary care could not have avoided colliding with the automobile of defendant, except by turning quickly to his right, it being impossible for him to drive his automobile to his left without colliding with defendant's automobile, there being insufficient time for him to have done so, in view of the positions of the said automobiles," and that "because of and as a direct result of said willful, wanton, reckless, and malicious operation by defendant of her said automobile, the automobile of deceased in thus turning to the right to avoid the collision went upon the soft dirt shoulder on the south west side of said Highway and the deceased having applied his brakes, deceased's automobile did then and there slip and skid in

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the soft dirt, turning sidewise in a southerly direction and crashed into one of said telephone poles, with such force and effect that the entire left side of deceased's automobile was instantly crushed inward thereby maiming and mangling deceased" and killing him.

The principal ground urged for reversal is that there was abundant evidence to sustain the willful and wanton count of the complaint, and that it was error to withdraw this count from the jury's consideration. Plaintiff bases her charge of willful and wanton misconduct upon the contention that defendant, although she could and did observe the position of Roberts' car through her rear view mirror, nevertheless suddenly and sharply crossed over to the curb lane in front of deceased's car without any signal or warning. There was a conflict in the evidence upon this question of fact. Defendant testified that she angled over to the right gradually, and that the Roberts' car was then approximately a block behind her. Fred Roberts, who was sitting in the front seat of his father's car, testified that defendant was only 25 or 30 feet in front of them when she crossed over suddenly, without any warning. Several other witnesses testified for plaintiff, and one Nelson, who was driving an automobile in the opposite direction some distance away, testified on behalf of defendant as to the approximate speed of Roberts' car. On oral argument plaintiff's counsel argued that according to defendant's own testimony she ^{saw} Roberts' car through her mirror, and that turning over sharply to the right, without signalling, indicated a reckless disregard of the rights of those riding in the Roberts' car, and constituted willful and wanton misconduct.

The courts of this State have frequently held that in order to constitute willful and wanton misconduct the injury must either have been intentionally inflicted or produced by acts so grossly negligent as to exhibit a reckless disregard for the safety of others. (Brown v. Illinois Terminal Co., 319 Ill. 326, 331.) Where there is no evidence of willful and wanton misconduct in the record the court should

so instruct the jury. But the law is equally well settled that if there is in the record any evidence "from which, if it stood alone, the jury could, 'without acting unreasonably in the eye of the law,' find that all the material averments of the declaration have been proven, then the cause should be submitted to the jury.

*** To hold otherwise is to deny the plaintiff the right of trial by jury." (Libby, McNeill & Libby v. Cook, 222 Ill. 210, 212.)

This rule applies to the charge of willful and wanton misconduct as well as to the charge of ordinary negligence. It would be idle to argue that there is no evidence to support the charge contained in the complaint. Whether defendant crossed over sharply when the Roberts car was only 25 to 30 feet behind her, or whether she angled over to the right gradually when the car was still some distance in the rear, were questions to be determined by the jury, and it was also a question of fact for the jury to determine whether or not these circumstances constituted willful and wanton misconduct on the part of defendant. Under the evidence adduced by plaintiff her counsel was entitled to argue to the jury the question of willfulness and wantonness, and by withdrawing that count from the consideration of the jury the court deprived her of that opportunity.

Various other questions are raised on appeal, but inasmuch as the cause will have to be retried we consider it unnecessary to discuss them and refrain as much as possible from commenting on the effect of the evidence introduced. We are of the opinion that upon the state of the record plaintiff was entitled to rely on both counts of her complaint and that it was error for the court to withdraw the willful and wanton count from the jury. The judgment of the Superior court is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

Seanlan and Sullivan, JJ., concur.

39542

MAE GREGAR (formerly
Mae Vohralik),
Appellee,

v.

ALBERT J. HORAN et al.,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

292 I:A. 638⁴

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

On January 6, 1937, Fred Hovadik had judgment in the municipal court against one Jerry Gregar for \$1,322. Execution issued thereon, and January 15, 1937, Albert J. Horan, bailiff of the municipal court, made a demand on said Gregar, and thereafter, February 26, 1937, levied upon the goods and chattels in the premises at 4001-03 Ogden avenue, Chicago. March 1, 1937, plaintiff herein, Mae Gregar, filed her trial of right of property action, claiming that she was then and ever since the 5th day of June, 1935, had been the owner and entitled to possession of the property levied upon. The bailiff of the municipal court and the original judgment creditor filed their appearance and affidavit of merits denying that Mae Gregar was the owner of the property or that she was entitled to possession thereof, and upon a hearing of the issues before the court without a jury a finding was made in favor of plaintiff, Mae Gregar, and judgment entered accordingly. This appeal followed.

The tavern and restaurant containing the chattels in question was formerly owned by Alois Kostka. May 22, 1935, Alois Kostka and his wife, Rose Kostka, entered into an agreement to sell the premises

35848

M/S ORIGIN (formerly
Mae Vornelick)

Applicant

v.

ALBERT J. HORN & SONS
Appellants

MR. JAMES L. HORN, JR.
COUNSEL FOR APPELLANTS

On January 6, 1937, Fred Kovachik was judgment in the

municipal court against one Jerry Hagan for \$1,122.25, Hagan's

license thereon, and January 12, 1937, Albert J. Horn, Appellant,

of the municipal court, made a demand on said Hagan, and Hagan

after, February 26, 1937, failed upon the goods and chattels in

the premises at 4001-03 Cedar Avenue, Chicago, Illinois, 1937,

plaintiff herein, Mae Hagan, filed her writ of right of recovery

action, claiming that she was then and ever since the day of

June, 1936, had been the owner and entitled to possession of the

property listed upon. The bill of the municipal court and the

original judgment captioned filed their appearance and affidavit of

merits denying that Mae Hagan was the owner of the property or

that she was entitled to possession thereof, and upon a hearing at

the instant before the court without a jury a finding was made in

favor of plaintiff, the Hagan, and judgment entered accordingly.

This appeal followed.

The court and arguments concerning the merits in question

was formerly owned by John Kovachik, May 22, 1932, after Kovachik and

his wife, Rose Kovachik, entered into an agreement to sell the premises

and contents to Mae Vohralik (the present plaintiff's maiden name) for the stipulated sum of \$2,500, the purchaser to assume a mortgage of \$1,200, making the total purchase price \$3,700. At the time this transaction was consummated Jerry Gregar was employed in Kostka's tavern assisting at the bar and having various other duties assigned to him. Plaintiff worked there as a waitress. Gregar was then approximately thirty-nine years of age, and plaintiff twenty-three. Although Mae Vohralik was designated as purchaser in the sales contract, several changes and interlineations were made therein by Gregar, who evidently handled the transaction. These changes are shown on the face of the contract which was received in evidence and were approved by Gregar, as indicated by his initials on the margin of the agreement. The tavern changed hands the early part of June, 1935. May 25, 1935, plaintiff gave Kostka a check for \$2,500, and executed a chattel mortgage for \$1,200 representing the balance of the purchase price. The bill of sale from Kostka to Mae Vohralik, showing a consideration of \$3,700, dated June 5, 1935, as well as the chattel mortgage in question, were introduced in evidence.

Plaintiff testified that from the time of the purchase of the restaurant and tavern it was conducted under the name of Gregar's restaurant, although she did not become the wife of Gregar until February 10, 1936. All the details of the transaction were handled by Gregar through an attorney.

It appears from the evidence that plaintiff is by profession a waitress and had been so engaged for about two years before the purchase. She earned approximately \$16 a week and also received tips. Upon the hearing she produced a bank book showing a balance of \$500 shortly before acquiring the tavern and restaurant. On May 7, 1935, about two weeks before the sales agreement was made, there

and amounts to the Voluntary (the present Plaintiff's maiden name) for the stipulated sum of \$1,000, the Plaintiff to receive a mortgage of \$1,000, making the total purchase price \$1,700. At the time this transaction was consummated Jerry Brown was residing in Los Angeles, California, and having various other duties assigned to him. Plaintiff looked there as a witness. Brown was then approximately thirty-nine years of age, and Plaintiff was three. Although the Voluntary was designated as purchaser in the deed, several changes and modifications were made there in by Brown, who primarily handled the transaction. These changes are shown on the face of the contract which was received in evidence and were approved by Brown, as indicated by his initials on the margin of the instrument. The changes made in the early part of June, 1935, by Brown, Plaintiff gave Brown a check for \$1,000, and executed a check for \$1,000 representing the balance of the purchase price. The bill of sale was given to the Voluntary, showing a consideration of \$1,700, dated June 5, 1935, as well as the original mortgage in question, both introduced in evidence.

Plaintiff testified that from the time of the purchase of the restaurant and tavern it was conducted under the name of Brown and Plaintiff, although she did not become the wife of Brown until February 10, 1936. All the details of the transaction were handled by Brown through an attorney.

It appears from the evidence that Plaintiff is by profession a witness and has been so employed for about two years before the purchase. She seemed approximately 35 years of age and was dressed like. Upon the hearing she produced a check for \$1,000, dated June 5, 1935, showing the balance of \$1,000 after the payment of the purchase price. On May 1, 1935, about two weeks before the trial, Plaintiff was again, about

was deposited in her account the sum of \$3,098.95. No explanation is made as to where she procured this money and defendants' counsel argues that it would have been impossible for her to have saved that sum during a period of two years as a waitress earning \$16 a week.

It further appears from the testimony of plaintiff that Jerry Gregar managed the place for her and took care of the tavern and bar, putting in about ten hours a day in the performance of his duties. He had charge of the other bartender, collected ~~checks~~ from customers, deposited the moneys in the cash register, purchased liquors for the tavern, and performed such other duties as were necessary to a proper conduct of the establishment. Plaintiff waited on table and served the customers.

There appears in evidence a lease, dated May 29, 1935, for the premises in question, entered into between Rudolph P. Dewes and the Northern Trust Company as trustees of the estate of Carl J. Dewes, deceased, as lessor, and Jerry Gregar, as lessee, commencing June 1, 1935, and expiring December 31, 1938, which provided that the lessee was to pay at the office of Parker and Finney, agents, \$10,290 in nineteen installments of \$210; twelve installments of \$250, and twelve installments of \$275. Under this indenture the lessee, Jerry Gregar, agreed "to observe and strictly comply with all federal, state and local laws and ordinances with respect to the sale or disposition of all alcoholic beverages and liquors." The lessee also agreed to operate his business in such a way that the insurance company which issued a policy to protect the landlord against liability imposed under the Illinois Liquor Control act, would have no cause for cancelling their policy.

According to the defendants the telephone number of Gregar's restaurant and barroom was listed as Crawford 7030. There appears in evidence a contract of the Illinois Bell Telephone Company with

was deposited in her account the sum of \$3,028.00. No explanation is made as to where she procured this money and how it was obtained. It would have been impossible for her to have saved the sum during a period of two years as she was earning only a week. It further appears from the testimony of Elizabeth that Jerry Green had the place for her and took care of the house and bar, putting in about ten hours a day in the performance of his duties. He had charge of the other bartender, called Charles, customers, deposited the money in the cash register, purchased liquor for the tavern, and performed such other duties as were necessary to a proper conduct of the establishment. Elizabeth waited on table and served the customers.

There appears in evidence a lease, dated May 22, 1935, for the premises in question, entered into between William J. Dewe and the Northern Trust Company as trustee of the estate of Carl J. Dewe, deceased, as lessor, and Jerry Green, as lessee, containing June 1, 1935, and expiring December 31, 1935, which provides that the lessee was to pay at the office of James M. Henry, agent, \$10,000 in minimum installments of \$200; twelve and one-half per cent, and twelve installments of \$75. Under this instrument the lessee, Jerry Green, agreed "to observe and strictly comply with all Federal, state and local laws and ordinances with respect to the sale or disposition of all alcoholic beverages and liquors." The lessee also agreed to operate his business in such a way that the instrument company which issued a policy to protect the lessee against liability imposed under the Illinois Motor Vehicle Act, would have no cause for cancelling their policy.

According to the defendant the telephone number of Green's restaurant and barroom was listed as CR 4-7039. There appears in evidence a contract of the Illinois Bell Telephone Company with

Jerry Gregar listing the 'phone under the foregoing number, signed by Jerry Gregar as agent for the telephone company, wherein it was agreed that Gregar should provide suitable space and proper light and heat for the telephone booth and permit the public to use the facilities, accept and collect only the company's established charges for messages sent when not deposited in coin collecting box, and under which he was to receive a stipulated commission for the use of the telephone by the public.

Defendants produced one Grace Blair Schannessey, who testified that she was assistant bookkeeper for Parker & Finney, real estate agents, and had charge of the rental account of Gregar's restaurant. From the records produced by her it appeared that Gregar had paid the monthly rentals as they accrued. On rebuttal plaintiff produced several checks, payable to Gregar, for these rentals, which were in turn indorsed by him and delivered to Parker & Finney.

Shortly after taking possession of the restaurant Jerry Gregar caused an advertisement to be placed in the Daily Svornost, a Bohemian newspaper. Anthony J. Cifka, a representative of the newspaper, produced a copy of the records showing that the announcement in the Bohemian language was inserted in the Daily Svornost on September 6, 1935, and for some nine days thereafter. Translated into the English language the announcement reads as follows:

"Announcement. I announce hereby to the Czechoslovakian public that I will have music and dance in my tavern every Wednesday and Friday evening, beginning Friday, September 6th, 1935. The music will be led by Frank Elner and his orchestra. Everyone is heartily invited to these dances in my modern restaurant where the best food is served and Michelob and Budweiser beer is on tap. You are assured of a delightful time by Jerry Gregar, proprietor. Gregar Tap Room and Restaurant, 4001 West Ogden Avenue, Chicago, Ill." (Italics ours.)

Gregar sought to explain this advertisement by saying that there was a mistake in the copy, but the original was introduced in evidence and the fact remains that it was published for ten successive days without any protest or complaint whatsoever on the part of Gregar or plaintiff.

Courts of this state have frequently pointed out that the law will carefully scrutinize transactions of this character between husband and wife, and that where a married woman advances her own money and places it in the hands of her husband, or vice versa, for the purpose of carrying on a general trade in the name of either party, the property bought with such money and the increase thereof, as to creditors, will belong to the party who really furnished the money and be liable to seizure for his or her debts. (Rease v. Barkowsky, 67 Ill. App. 274; Story & Clark Piano Co. v. Kropsch, 231 Ill. 419; Hawk v. Van Ingen, 196 Ill. 20; Robinson v. Brems, 90 Ill. 351.)

Plaintiff's statement that she furnished the money with which this tavern was purchased, without any explanation as to the source from which the funds were obtained, is not sufficiently convincing to contradict the suspicious circumstances of the case. Obviously she could not have accumulated so large a fund by working as a waitress, earning upward of \$16 a week for two years. After a careful consideration of the record, we have reached the conclusion that the finding and judgment are contrary to the manifest weight of the evidence. Upon retrial the parties will have an opportunity to inquire more extensively into the source of the funds and whether the money with which the tavern was purchased really belonged to plaintiff. For these reasons, the judgment of the municipal court is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

Scanlan and Sullivan, JJ., concur.

39374

C. P. BALT,
Appellant,

v.

FRANK R. HARTMAN,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

292 I.A. 639¹

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Judgment by confession was entered in favor of C. P. Balt, appellant, and against Frank R. Hartman, appellee, for \$316.11 on a judgment note containing the usual provisions. Within thirty days appellee filed a petition in which he set up that he had "a meritorious defense to plaintiff's entire demand, in that, said purported note, upon which judgment by confession was taken, has been fully paid." The petition prayed that the judgment be set aside and that defendant be granted leave to plead to the complaint and to defend the suit upon the merits. The affidavit in support of the petition averred that the note upon which the judgment was taken was fully paid at the time judgment was rendered. An order was entered that defendant be given leave to make defense to the suit, the judgment to stand as security, and that execution be stayed. Defendant's affidavit of merits states that he is an attorney practicing at the Chicago bar;

"That this defendant paid said note by legal services rendered, prior and subsequent to February 4, 1933, for and on behalf of and at the request of the plaintiff herein;

"That the plaintiff herein agreed to return the note marked paid and cancelled to said defendant in part payment of the legal services hereinafter set forth, to apply on account of his fees for legal services rendered, but has failed so to do;

33374

O. P. BALT,
Appellant,

v.

THOMAS R. HARTMAN,
Appellee.

APPEAL FROM JUDGMENT

COURT OF CHICAGO.

33374

MR. JUSTICE ...

Judgment by confession was entered in favor of O. P. Balt, appellant, and against Frank R. Hartman, appellee, for \$10.11 on a judgment note containing the usual provisions. Within thirty days appellee filed a petition in which he set up that he had "meritorious defense to plaintiff's entire demand, in that, said purported note, upon which judgment by confession was taken, has been fully paid." The petition prayed that the judgment be set aside and that defendant be granted leave to plead to the complaint and to defend the suit upon the merits. The plaintiff in support of the petition overrode that the note upon which the judgment was taken was fully paid at the time judgment was rendered. An order was entered that defendant be given leave to make defense to the suit, the judgment to stand as a nullity, and that execution be stayed. Defendant's affidavit of meritorious defense that he is an attorney practicing at the Chicago bar;

"That this defendant paid said note by legal services rendered, broken and undrawn to plaintiff, for and on behalf of and at the request of the plaintiff herein;

"That the plaintiff herein agreed to return the note marked paid and cancelled to said defendant in full payment of the legal services hereinbefore set forth, to apply on account of his fees for legal services rendered, but has failed to do so;

"That on or about November 23, 1932, the defendant was retained by C. P. Balt, plaintiff herein, to represent him in the preparation and drafting of a Voting Trust Agreement, by and between the stockholders of a George Morrell Corporation, a Michigan corporation, and the defendant herein did prepare said agreement and accompanied the plaintiff on divers trips to Michigan and as a result of these trips, did prepare and draft other agreements for said corporation at the request of the plaintiff herein, and that defendant herein did advise the plaintiff that his fee for said services was \$350.00, which the plaintiff promised to pay;

"That on or about August 2, 1934, this defendant was again retained by the plaintiff herein to assist him in securing refunds of insurance policy premiums from a Mr. Carl LeBuhn, of Davenport, Iowa; that this defendant did perform valuable legal services in this matter for the plaintiff herein, which entailed a trip to Davenport, Iowa; that at the conclusion of this case, defendant herein advised the plaintiff that his fee would be \$200.00, which the plaintiff agreed to pay;

"That on or about April 10, 1934, this defendant represented the plaintiff herein in the matter of a certain contract plaintiff herein had with the Chicago-Elgin Lithotype Co. and that during the time the defendant represented the plaintiff in this matter, it was necessary for the defendant to make several trips to Elgin, Illinois, and consult with the officers of said company; that at the conclusion of this case, the defendant herein advised the plaintiff that the fee for his services would be \$150.00, which the plaintiff agreed to pay;

"That on or about June 20, 1934, the plaintiff herein, who occupied an office in this defendant's suite, did vacate said premises and give up said office, and that on or about June 20, 1934, the defendant herein made demand upon the plaintiff to pay him various sums of money owed to said defendant for legal services performed in the matters herein set forth, said amount being approximately \$700.00; that the plaintiff herein said he would deduct \$222.25, the principal of said note, on which plaintiff has secured judgment in this case, together with such interest charges as may have accrued on said note, and return said note to the defendant herein, marked paid and cancelled;

"That this defendant is not indebted to the plaintiff, C. P. Balt, for any sum of money whatsoever; Wherefore, defendant prays judgment, that said judgment in favor of plaintiff, C. P. Balt, and against defendant, Frank R. Hartman, be set aside, vacated and declared null and void as against defendant, and that said defendant herein may have such other and further relief as may be equitable in the premises."

The cause was tried by the court, without a jury, and the issues were found against plaintiff. The following judgment was entered:

"This cause coming on for further proceedings herein, it is considered by the Court that final judgment be entered on the finding herein, that the plaintiff take nothing by this suit, and that the defendant have and recover of and from the plaintiff the costs by the defendant herein expended, and that execution issue therefor."

Plaintiff has appealed.

"That on or about November 22, 1933, the defendant was retained by G. E. Self, Plaintiff herein, in connection with the preparation and drafting of a Voluntary Assignment, by and between the Association of a College of Business Law, a Michigan corporation, and the defendant herein his property and agreement and accompanied the plaintiff on three trips to Michigan and on a result of these trips, the parties and that other agreement for said corporation at the request of the plaintiff herein, and that defendant herein did advise the plaintiff that his fee for said services was \$150.00, which the plaintiff promised to pay;

"That on or about August 2, 1934, this defendant was again retained by the plaintiff herein to assist him in securing returns of income tax policy premiums from a Mr. Carl Davidson, of Daventry, Iowa; that this defendant the plaintiff herein, which services in this matter for the plaintiff herein, which services a trip to Leavenworth, Iowa; that at the conclusion of this case, defendant herein advised the plaintiff that his fee would be \$200.00, which the plaintiff agreed to pay;

"That on or about April 10, 1934, this defendant represented the plaintiff herein in the matter of a certain contract plaintiff herein had with the Ohio Ice-Machine Company Co. and that during the time the defendant represented the plaintiff in this matter, it was necessary for the defendant to make several trips to Ohio, Illinois, and generally with the officers of said company; that at the conclusion of this case, the defendant herein advised the plaintiff that his fee for his services would be \$150.00, which the plaintiff agreed to pay;

"That on or about June 22, 1934, the plaintiff herein, who occupied an office in this defendant's office, the parties said premises and give up said office, and that on or about June 20, 1934, the defendant herein was engaged upon the plaintiff to pay his various sums of money owed to said defendant for legal services performed in the matters herein set forth, said amount being approximately \$700.00; that the plaintiff herein said he would deduct \$225.00, the balance of said note, on which plaintiff had secured the same in this case, together with such interest charges as may have accrued on said note, and return said note to the defendant herein, marked paid and cancelled;

"That this defendant is not indebted to the plaintiff, G. E. Self, for any sum of money whatsoever; therefore, defendant pays judgment, first said judgment in favor of plaintiff, G. E. Self, and against defendant, Frank E. Hartman, be not paid, unless and until charged null and void as against defendant, and the said defendant herein may have such other and further relief as may be awarded in the premises."

The cases were tried by the court, without a jury, and the

issues were found against plaintiff. The following findings were

made:

"This court found on the further proceedings herein, it is considered by the Court that final judgment be entered on the finding herein, that the plaintiff is entitled to the said sum of money, and that the defendant herein is liable to pay the same, and that execution thereon be granted."

The trial court correctly held that the burden was upon defendant to prove his defense of payment by a preponderance of the evidence. He further held that defendant had sustained that burden. Plaintiff urges six reasons why the judgment entered by the trial court upon the trial of the cause should be reversed. It is necessary to consider only one, viz., "that the court erred in finding that the appellee had met his burden of proving his defense by preponderance of evidence." After a reading of the entire record we are satisfied that this contention must be sustained. Plaintiff was an accountant; defendant, a lawyer. Represented by an able and experienced lawyer, defendant conceded, of course, that he had the burden of proving the defense of payment. The uncanceled note was in the possession of plaintiff. Defendant testified that he rendered three items of legal services for plaintiff, aggregating \$700; that in 1934 plaintiff owed him approximately \$700 and that he, defendant, owed the amount of the note in question; that they got together to decide upon a settlement; that defendant agreed to forget the \$700 worth of services and plaintiff agreed to forget the note, but that "he [plaintiff] didn't bring in the note." "Q. When did he agree he was going to return it? A. He didn't specifically say. * * *"

The witness then stated that he saw plaintiff for a year after that time when plaintiff would call to get his mail and make telephone calls. "Q. Did you ask him at any other time for it? A. No, I didn't. I assumed it was all disposed of at that time. I knew him pretty well. We were very close friends." Defendant further testified: "On or about August 20, 1934, I asked Mr. Balt that a settlement be made of the accounts between us. I entered into a settlement with Mr. Balt about that time. We entered into a complete settlement of all the claims between us - 'miscellaneous

The trial court correctly held that the burden was upon defendant to prove his defense of payment by a promissory note of the evidence. He further held that defendant had introduced that burden. Plaintiff urges six reasons why the judgment entered by the trial court upon the trial of the cause should be reversed. It is necessary to consider only one, viz., "that the court erred in finding that the appellee had met his burden of proving his claim by preponderance of evidence." After a recital of the entire record we are satisfied that this contention must be sustained. Plaintiff was an accountant; defendant, a lawyer. Represented by an able and experienced lawyer, defendant conducted, of course, what he had the burden of proving the defense of payment. The undersigned notes that in the possession of plaintiff. Defendant testified that he introduced three items of legal services for plaintiff, as follows: 1. That in 1934 plaintiff owed him approximately \$700 and that he, defendant, owed the amount of the note in question; that they got together to decide upon a settlement; that defendant agreed to loan the \$700 worth of services and plaintiff agreed to loan the note, the first "he [Plaintiff] didn't bring in the note." "A. That is the way he was going to return it? A. He didn't specify in any way." The witness then stated that he saw plaintiff for a year after that time when plaintiff would call to get his bill and make telephone calls. "Q. Did you ask him at any other time for it? A. No, I didn't. I assumed it was all disposed of at that time. I knew him pretty well. We were very close friends." Defendant further testified: "On or about August 20, 1934, I asked Mr. Smith that a settlement be made of the account between us. I entered into a settlement with Mr. Smith about that time. He entered into a complete settlement of all the claims between us - miscellaneous

items including the note.' I agreed to waive any and all fees I had and in consideration of the waiving of all my fees, Mr. Balt agreed in respect of the note he held, to cancel that and all other settlements that were made. That was all part of the settlement." Plaintiff testified that he never employed defendant to render any legal services, and never agreed to pay him for any legal services; that defendant never made any demand on him for \$700 or any other amount for legal services; that in a conference the parties agreed on the amount of rent defendant owed plaintiff; that he never agreed to surrender the note and defendant never asked him to do so; that defendant was indebted to plaintiff "in addition to the note." It has been held that where there is no material evidence bearing upon the question of payment, except that of the parties, each of whom directly contradicts the other, the fact that the plaintiff produces the note from his possession, uncanceled, corroborates his testimony to that extent as will give him the right to recover. See Steumbaugh v. Hallam, 48 Ill. 305. To quote from the opinion of the court (pp. 306-7):

"It may safely be laid down as a general rule, under our recent statute authorizing parties to testify, that in suits to collect notes, where the plaintiff or complainant has them, uncanceled, in his possession, and the defendant sets up payment, if there is no material evidence besides that of the parties, one of whom swears the notes have been paid, and the other that they have not been, the presumption arising from the fact of their possession, uncanceled, by the party claiming, should be regarded as turning the scale in his favor. Any other rule would furnish strong temptations to perjury, and be very perilous to creditors."

However, there are facts and circumstances that satisfy us that plaintiff's testimony, rather than defendant's, should be credited. In his affidavit of merits defendant avers "that the plaintiff herein agreed to return the note marked paid and cancelled to said defendant in part payment of the legal services hereinafter set forth, to apply on account of his fees for legal services rendered, but has failed so to do." In his testimony before the court he testi-

fied that the parties made a complete settlement of all claims between them; that he agreed to forget the \$700 worth of legal services and that plaintiff agreed to forget the note. No receipts passed between the parties. Defendant neither received nor demanded the return of the note. As to one of the items of services for which defendant makes a charge against plaintiff, Ernest Mueller testified that neither plaintiff nor defendant had any connection with that matter. Defendant testified that he kept no book account of any of the alleged services and that the statement of the charges in his affidavit was made up from his memory. The first item of his account, \$350, relates to services that he claims he rendered plaintiff in 1932. On February 4, 1933, defendant borrowed from plaintiff \$222.25 and to evidence the debt executed the note in question. Just why he should execute this note if plaintiff then owed him \$350 for services, is not explained. If plaintiff owed defendant \$700 at the time of the alleged settlement, why was defendant willing to cancel his claim of \$700 for the surrender of the note? His testimony as to the alleged agreement does not accord with the pertinent averments in the affidavit of merits. A reading of the entire evidence satisfies us that the defense was a mere afterthought, without any basis in fact or justice.

The judgment of the Municipal court of Chicago entered September 14, 1936, is reversed, leaving the judgment by confession entered July 11, 1936, in full force and effect.

JUDGMENT ENTERED SEPTEMBER 14, 1936, REVERSED,
LEAVING JUDGMENT ENTERED JULY 11, 1936, IN FULL
FORCE AND EFFECT.

Friend, P. J., and Sullivan, J., concur.

that the parties made a complete settlement of all claims between them; that he agreed to liquidate the two notes of legal services and that plaintiff agreed to liquidate the notes. The settlement passed between the parties. Plaintiff's witness testified that the return of the note, as to one of the items of evidence for which defendant makes a charge against plaintiff, cannot be proven by the fact that neither plaintiff nor defendant has any connection with that matter. Defendant testified that he kept no book account of any of the alleged services and that the statement of the charges in his affidavit was made up from his memory. The first item of his account, \$350, relates to services that he claims he rendered plaintiff in 1932. On February 4, 1933, defendant borrowed from plaintiff \$232.75 and to evidence the debt executed the note in question. Just after he executed this note it plaintiff then owed him \$350 for services, in not explained. If plaintiff owed defendant \$700 at the time of the alleged settlement, why was defendant willing to cancel his claim of \$700 for the surrender of the note? His testimony as to the alleged agreement does not accord with the pertinent statements in the affidavit of plaintiff. A recital of the entire evidence submitted in this case was made in the letterhead, without any basis in fact or law.

The judgment of the Municipal Court of Chicago entered September 11, 1936, is reversed, leaving the judgment of the court entered July 11, 1936, in full force and effect.

THE COURT, CHIEF JUSTICE, EDWARD J. RYAN, presiding.
JUDGES: JUSTICE OF THE PEACE, EDWARD J. RYAN, presiding.
JURY: EDWARD J. RYAN, presiding.

Friend, P. J., and William J., Chicago.

39427

MIKE CALLOS,
Plaintiff,

v.

PUBLIC TAXI SERVICE, INC.,
a Corporation, and WILLIAM
SUMBERG,

Defendants.

GEORGE BOZNOS,
Plaintiff,

v.

PUBLIC TAXI SERVICE, INC.,
a Corporation, and WILLIAM
SUMBERG,

Defendants.

Consolidated as
Superior Court
No. 34-S-14696

292 I.A. 639²

MIKE CALLOS and GEORGE
BOZNOS,

Appellants,

v.

PUBLIC TAXI SERVICE, INC.,
a Corporation, and WILLIAM
SUMBERG,

Appellees.

APPEAL FROM
SUPERIOR COURT OF
COOK COUNTY.

MR. JUSTICE SCAMIAN DELIVERED THE OPINION OF THE COURT.

This appeal was consolidated for hearing with the appeal in Mike Callos v. Public Taxi Service, Inc., a corporation (Gen. No. 39332), in which case we have this day filed an opinion wherein we have also set forth our reasons and conclusions touching the matters involved in the instant appeal, and for the reasons and conclusions stated in that opinion that part of the judgment order of the Superior court of Cook county entered November 7, 1936,

1998 01 15

THE ABOVE LISTED
WILLIAM A. ROBERTSON &
ATTORNEYS

1948

1. The first of these is the fact that the
2. Government has not been able to secure
3. the necessary funds to carry out its
4. policy of non-interference in the
5. internal affairs of the country.

1950-1951

1. The first of these is the fact that the
the first of these is the fact that the
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• 1990 LIST OF RESEARCHERS AND RESEARCHERS' ASSOCIATES

of the Inspector came at about twenty minutes past 10:00, and the Inspector stated in this opinion that out of the numerous other matters involved in the instant appeal, and for his reasons and we have also set forth the reasons and conclusions involving the No. 33322, in which case we have this appeal on appeal No. 33322, in Mike Geller v. State of New York, Inc., a corporation (see this appeal was consolidated for hearing with the appeal

wherein it is adjudged that plaintiff Mike Gallos take nothing by his suit and that defendant William Sumberg go hence without day; that plaintiff George Boznos take nothing by his suit and that defendants Public Taxi Service, Inc., a corporation, and William Sumberg go hence without day; and that defendant Public Taxi Service, Inc., a corporation, recover from plaintiff George Boznos one dollar and costs on said defendant's counterclaim, is reversed, and the two cases, Mike Gallos v. Public Taxi Service, Inc., a corporation, and William Sumberg, and George Boznos v. Public Taxi Service, Inc., a corporation, and William Sumberg, which were consolidated for trial in the Superior court of Cook county, are remanded for a new trial.

JUDGMENT ORDER OF NOVEMBER 7, 1936,
REVERSED IN PART, AND THE TWO CASES
CONSOLIDATED FOR TRIAL IN SUPERIOR
COURT OF COOK COUNTY, REMANDED FOR
A NEW TRIAL.

Friend, P. J., and Sullivan, J., concur.

wherein it is alleged that defendant with intent to defraud
his wife and that defendant William G. Jones, to induce others to
that plaintiff George Jones, was notified by his wife and that
defendant George Jones, Inc., a corporation, and William
G. Jones, to induce without any and that defendant George Jones, Inc.,
Inc., a corporation, received from plaintiff George Jones and William
and costs on said defendant's bond, is received, and the two
cases, William G. Jones v. George Jones, Inc., a corporation, and
William G. Jones v. George Jones, Inc., a corporation, and
William G. Jones v. George Jones, Inc., a corporation, which were consolidated for trial
in the superior court of Cook County, are removed for a new trial.

RECORDED IN BOOK 10, PAGE 101, 1913,
INDEXED IN BOOK 10, PAGE 101, 1913,
COMMISSIONER OF THE LAND OFFICE,
COUNTY OF COOK COUNTY, ILLINOIS
A TRUE COPY.

Witness, T. U. and William, etc. common.

39471

MELROSE PARK WRECKING CO.,
a corporation (Plaintiff
and Cross-Defendant),
Appellee.

v.

PATRICK WARREN CONSTRUCTION
CO., a corporation (Defendant
and Cross-Plaintiff),
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

292 I.A. 639³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, appellee, sued defendant, appellant, upon a written contract. Defendant filed an affidavit of merits to plaintiff's amended statement of claim and also a counterclaim. The cause was tried by the court, the issues were found in favor of plaintiff on its claim, against defendant on its counterclaim, and judgment was entered for plaintiff in the sum of \$935. Defendant and cross-plaintiff (hereinafter called appellant) appeals.

The amended statement of claim alleges that appellant is in the construction and contracting business and, together with others, was building, remodeling and improving the Wheaton Junior High School at Wheaton, Illinois; that as general contractor for said work appellant contracted with plaintiff "to do certain work, labor, materials, wrecking and hauling" for appellant on said construction job. The written "purchase Order" signed by appellant, addressed to plaintiff and accepted by plaintiff, is made a part of the statement of claim. The statement of claim further alleges that plaintiff performed everything required of it by the contract and thereupon it became entitled to the sum of \$1,550, as provided for in said purchase

32441

WILLIAM H. WILSON CO.,
a corporation (Plaintiff
and Cross-Defendant),
vs.
PATRICK WILSON CONSTRUCTION
CO., a corporation (Defendant
and Cross-Defendant),
Appellant.

COURT OF THE CO.

32441A. 633

THE JUSTICE COURT DIVISION OF THE COUNTY.

Plaintiff, appellee, and defendant, appellant, upon a written contract. Defendant filed an affidavit of merits to Plaintiff's amended statement of claim and also a counterclaim. The case was tried by the court, the issues were found in favor of Plaintiff on its claim, against defendant on its counterclaim, and judgment was entered for Plaintiff in the sum of \$250. Defendant and cross-Plaintiff (hereinafter called appellant) appeals. The amended statement of claim alleges that appellant is in the construction and contracting business and, together with others, was building, remodeling and improving the Weston Union High School at Weston, Illinois; that as general contractor for said work appellant contracted with Plaintiff "as a subcontractor, labor, material, work and hauling" for appellant on said construction job. The written "Purchase Order" signed by appellant, addressed to Plaintiff and accepted by Plaintiff, is made a part of the statement of claim. The statement of claim further alleges that Plaintiff performed everything required of it by the contract and thereupon it became entitled to the sum of \$1,500, as provided for in said purchase

order; the sum of \$300 for extra work done wrecking attic floor and ceiling; the sum of \$300 for 60,000 bricks delivered to the appellant; ^{and} the value of iron pipes, "salvagable" from the wrecked premises, \$450, which pipes plaintiff claims it was lawfully entitled to, but which were removed from the building by appellant. The statement further alleges that appellant is entitled to the following credits: Cash received by plaintiff from appellant, \$250; approximate charges paid by appellant to F. B. Wheaton Company for hauling brick, \$75; approximate charges paid by appellant for freight on brick, \$90; for hauling debris, \$100; for removing brick, \$100. The statement alleges that there is a balance of \$1,985 due plaintiff from appellant after the latter is allowed all just credits. To the amended statement of claim appellant filed an affidavit of merits admitting the contract between the parties, denying that plaintiff performed everything required of it by the contract; that

"(a) Plaintiff failed and refused to fully wreck the east, west and south walls of the north section of the old building far enough down to meet the new line of roof joists, necessitating the employment of additional labor by this defendant at its own expense, to wreck the same, at a cost to it of \$36.00.

"(b) Plaintiff failed and refused to wreck the tower portion of the south section of the old building to grade and the rubble stone on the east, west and south walls, as provided in the aforesaid order, necessitating the employment of additional labor, by this defendant, at its own expense, to do the same, at a cost to this defendant of \$120.00;"

that plaintiff failed to leave on the site for use of appellant, as provided in the agreement, "all lumber, with the exception of 1" flooring boards, obliging this defendant to replace by purchase, that which the plaintiff unlawfully removed from the site, the following lumber:" (Here follow certain items of lumber.) The affidavit then alleges that it cost appellant \$1,078.48 to replace the said lumber; that

order; the sum of \$200 for extra work was given - as this was
and ceiling; the sum of \$100 for extra work delivered to the
and
appliance, the value of which was \$100, was given to the
promise, \$100, which given plaintiff claim it was actually
delivered to, but which were removed from the building by plaintiff.
The statement further alleges that plaintiff is entitled to the
following credits: Cash received by plaintiff from defendant,
\$200; advance payment made by plaintiff to J. A. Johnson Company
for heating brick, \$75; advance payment made by plaintiff for
fuel oil on brick, \$200; for heating oil, \$100; for heating oil
brick, \$100. The statement alleges that there is a balance of
\$1,987 due plaintiff from defendant after the latter is allowed all
just credits. To the amended statement of claim plaintiff filed an
affidavit of verity admitting the contents of the petition, deny-
ing that plaintiff performed everything required of it by the con-
tract; that
"(a) Plaintiff failed and refused to fulfill its contract
and to complete the construction of the building, and
to erect the same, as a result of which the
ground down to meet the new line of roof joists, and to erect the
employment of additional labor by this defendant at its own expense,
to erect the same, at a cost of \$1,987.
"(b) Plaintiff failed and refused to erect the lower por-
tion of the south section of the building to which the contract
relates, and to complete the same, and to erect the same, and to
erect the same, and to complete the same, and to erect the same,
by this defendant, at its own expense, to the sum of \$1,987,
to the defendant of \$1,987.
That plaintiff failed to leave on the site for use of plaintiff, as
provided in the agreement, all material, with the exception of the
flooring boards, ceiling, and the same to be replaced by plaintiff, and
which the plaintiff actually received from the site, the following
materials: (1) Three hundred and thirty (330) feet of lumber, which
plaintiff used at cost of plaintiff, \$1,987, to replace the said lumber;
that

"Plaintiff failed and refused to clean and pile on the site of wreckage all the brick removed by it from the walls of the old building, thereby compelling this defendant to remove the same to dumps at a cost to this defendant of \$258.00, and obliging this defendant to purchase used brick on the open market as follows:

"Cost of removal of brick not cleaned 129 loads @ \$2.00	\$258.00
"Cost of old brick purchased, 83,000	440.00
"Freight paid on 2 cars of brick from Melrose Park Wrecking Co.	81.36
"Hauling paid on 2 cars of brick from Melrose Park Wrecking Co.	70.60
"Cost of face brick used (instead of old face brick) on North section, 19,000 \$18.00 per M	342.00
"Total	<u>\$1,191.96"</u>

The affidavit then alleges:

"In addition thereto this defendant is entitled to a credit of \$64.00, being the saving to the plaintiff by reason of changes in the plans and specifications aforesaid, whereby the wrecking of one large chimney on the north wall of the old building, as originally provided therein, was cancelled, and cash advanced to the plaintiff in the amount of \$250.00 on August 27, 1935; to the damage of this defendant in the sum of \$2740.44, deducting therefrom the sum of \$1550.00, the amount plaintiff contracted to perform the foregoing agreement for, leaves a loss due and owing to this defendant from the plaintiff in the amount of \$1190.44." (Italics ours.)

The affidavit concludes with a denial that plaintiff performed the things required of it by the contract or that it performed any extra work as set forth in the amended statement of claim, or that appellant "ever promised plaintiff any payment as set forth in said statement of claim."

Appellant filed a counterclaim, the items of which it states are "practically identical with said affidavit of merits." The counterclaim concludes as follows:

"In addition thereto this defendant is entitled to a credit of \$64.00, being the savings to the plaintiff by reason of changes in the plans and specifications aforesaid, whereby the wrecking of one large chimney on the north wall of the old building, as originally provided therein, was cancelled, and cash advanced to the plaintiff in the amount of \$250.00 on August 27, 1935; to the damage of this defendant in the sum of \$2740.44, deducting therefrom the sum of \$1,550.00, the amount plaintiff contracted to perform the foregoing agreement for, leaves a loss due and owing to this defendant from the plaintiff in the amount of \$1190.44; to collect which amount, together with statutory interest thereon from August 19, 1935, to date of suit, defendant brings this suit." (Italics ours.)

the following information was obtained from the above sources:

[illegible]

The office will close 11:00 a.m.

[illegible]

"ever promised Plaintiff any payment as set forth in said statement
work as set forth in the attached statement of claim, or any financial
things required of it by the contract or laws it pertained any other
the affidavit concluded with a denial that Plaintiff ever made the
of claim."

are "protection" (the word is used in the sense of "protection") and "protection" (the word is used in the sense of "protection").

[illegible]

To quote from appellant's brief:

"Errors Relied Upon For Reversal:

"1. The court erred in ruling that the burden of proof throughout was on the defendant.

"2. The judgment is contrary to and against the weight of the evidence.

"3. The court erred in permitting the plaintiff to introduce improper, irrelevant and immaterial evidence.

"4. The court erred in overruling defendant's objections to certain evidence of the plaintiff.

"5. The court erred in refusing to allow the defendant to introduce certain evidence offered by it that was material, relevant and pertinent to the issues.

"6. The court erred in entering judgment for the plaintiff.

"7. The court erred in not entering judgment for the defendant against the plaintiff in the amount of \$1,126.44."

As points 3, 4 and 5 are not argued they need not be considered.

Points 6 and 7 are not argued, and they are based, apparently, upon the assumption that point 2 is meritorious. It will be observed that none of the points alleges that plaintiff did not make out a prima facie case as to its claim, nor that it did not make out a prima facie defense to the counterclaim. It is only necessary to consider points 1 and 2.

As to point 1: When the cause was called for trial counsel for plaintiff called attention to the parts of the affidavit of merits and the counterclaim which we have heretofore quoted and italicized, and stated that appellant thereby admitted an indebtedness to plaintiff of \$1,550 and plaintiff was not obliged to introduce evidence at that time in support of its claim, and that appellant should proceed to prove its counterclaim. Counsel for appellant contended that it made no such admission by the language in question and plaintiff was obliged "to make out its case first." It appears that the court heard arguments on the question raised, but they are omitted from the record. It sufficiently appears, from the record,

To prove from appellant's point:

"From Belief Upon the Evidence:

"1. The court erred in ruling that the burden of proof throughout was on the defendant.

"2. The judgment is contrary to and against the weight of the evidence.

"3. The court erred in permitting the plaintiff to introduce improper, irrelevant and immaterial evidence.

"4. The court erred in overruling defendant's objections to certain evidence of the plaintiff.

"5. The court erred in refusing to allow the defendant to introduce certain evidence offered by it that was material, relevant and pertinent to the issues.

"6. The court erred in entering judgment for the plaintiff.

"7. The court erred in not entering judgment for the defendant against the plaintiff in the amount of \$1,100.00."

As points 3, 4 and 5 are not argued they need not be considered. Points 6 and 7 are not argued, and they are based, apparently,

upon the assumption that point 2 is material. It will be observed

that none of the points alleges that plaintiff did not make out a

prima facie case as to its claim, nor that it did not make out a

prima facie defense to the counterclaim. It is only necessary to

consider points 1 and 2.

As to point 1: When the cause was called for trial counsel

for plaintiff called attention to the parts of the affidavit of

marriage and the counterclaim in which we have heretofore quoted and

stated, and stated that appellant thereby admitted an indebted-

ness to plaintiff of \$1,100 and plaintiff was not obliged to intro-

duce evidence at that time in support of its claim, and that plaintiff

should proceed to prove its counterclaim. Should I say anything

elsewhere that it made no such admission by the language in question

and plaintiff was obliged "to make out its case first." It appears

that the court based its decision on the question raised, but that it

that it was plaintiff's theory that by the language in question in appellant's affidavit of merits and counterclaim it credited plaintiff with \$1,550, and thereby admitted plaintiff's claim. The court sustained plaintiff's position. Appellant concedes that if the language in question amounted to an admission of plaintiff's claim the ruling would be justified, but it contends that a reading of the entire counterclaim shows that appellant did not intend to admit plaintiff's claim. While the argument of plaintiff in support of its position has some force, we have reached the conclusion, after a careful study of the record, that even though the trial court erred in its ruling appellant did not suffer thereby. As we have heretofore stated, appellant makes no point that plaintiff failed to make out a prima facie case as to its claim. Appellant introduced evidence bearing upon plaintiff's claim and its counterclaim. Plaintiff offered evidence bearing upon its claim and the counterclaim. Appellant offered evidence in rebuttal. Both sides fully covered the subject matter of the claim and counterclaim. At the conclusion of the evidence the trial court requested counsel to submit briefs on the law bearing upon the case and stated that he would carefully review the evidence and consider the briefs of counsel before deciding the case. Neither the briefs submitted nor the decision rendered ~~by the trial court~~ ^{rendered} by the trial court is incorporated in the record. For aught that appears in the record the trial court, in reaching his decision, may have placed the burden of proving its case upon plaintiff. In any event, the material question before us is, Are the trial court's findings sustained by the evidence?

As to point 2, that the judgment is against the weight of the evidence: Plaintiff's amended statement of claim alleges that it was entitled to the sum of \$300 for extra work for wrecking the attic floor and ceiling, and to \$450, the value of iron pipes salvable from

that it was admitted that the plaintiff in question
in appellant's affidavit of merits and a motion was made
last night with 11, 1900, and the jury rendered judgment
the court sustained appellant's motion. Appellant contended
that if the language in question is construed as an admission of
plaintiff's claim the motion would be granted, but the court
that a reading of the entire document shows that appellant did
not intend to admit plaintiff's claim. While the argument of plain-
tiff in support of his position has some force, we have reached the
conclusion, after a careful study of the record, that even though
the trial court erred in its ruling plaintiff did not suffer thereby.
As we have heretofore stated, appellant makes no point that plaintiff
failed to make out a prima facie case as to its claim. Appellant
introduced evidence bearing upon plaintiff's claim and its counter-
claim. Plaintiff offered evidence bearing upon its claim and the
counterclaim. Appellant offered evidence in rebuttal. Both sides
fully covered the disputed matter of the claim and counterclaim. It
the conclusion of the evidence the trial court requested counsel to
submit briefs on the law bearing upon the case and stated that he
would carefully review the evidence and consider the briefs of counsel
before rendering the decision. Neither the parties nor the court
y the trial court as incorporated in the record. Now that
that appears in the record the trial court, in rendering its decision,
may have based the portion of its opinion upon the evidence. In
any event, the material question before us is, in the trial court's
findings sustained by the evidence?

As to point 2, that the judgment is against the right of the
evidence. Plaintiff's counter statement of claim alleges that it was
willful to the sum of \$100 for extra work for waiting the at to
floor and ceiling, and so \$400, the value of four pipes and the two

the wrecked premises, to which it was lawfully entitled but which were removed from the building by appellant. Appellant has seen fit to argue that the weight of the evidence shows that plaintiff was not entitled to either item. It is a sufficient answer to the argument to say that the court disallowed both items. Appellant contends that the amount of the court's finding, \$935, was a "mystery finding," "an arbitrary, perfunctory, forced or compromise judgment," and that it does not appear just how the court reached the amount allowed plaintiff. Had the decision of the trial court been incorporated in the record the manner in which the court reached his finding would doubtless have been clearly shown. However, it is not difficult to ascertain how the court fixed the amount of plaintiff's damages. The amount fixed in the contract, \$1,550, was allowed, and the extra work item, ^{the \$300 item for 60,000 bricks,} and the item for the value of iron pipes were disallowed. Appellant was allowed the credits which plaintiff admitted in its amended statement appellant was entitled to, viz., cash received by plaintiff from appellant, \$250; approximate charges paid by appellant to F. E. Wheaton Company for hauling brick, \$75; approximate charges paid by appellant for freight on brick, \$90; for hauling debris, \$100; for removing brick, \$100. Deducting the total of these credits, \$615, from \$1,550, leaves \$935, the amount allowed plaintiff. The judgment order shows that the court found the issues against appellant on its counterclaim.

The main point urged in support of appellant's counterclaim is that the trial court should have found that by reason of plaintiff's failure to clean the brick salvaged from the wrecked premises appellant was compelled to remove the brick to dumps at a cost of \$258 and was obliged to purchase used brick in the open market, and as a result of plaintiff's failure to clean the brick appellant suffered a loss of \$1,191.96. At the time plaintiff started cleaning the brick it was

the proposed premises, to which it was lawfully entitled and which were removed from the building by appellant. Appellant has been fit to argue and the weight of the evidence shows that appellant was not entitled to such a result. It is a well-known principle of law that the court should disallow such a result. Appellant contends that the amount of the court's findings, \$25,000, is a "grossly" finding," an arbitrary, partial, or capricious finding," and that it does not appear that the court reached the amount allowed plaintiff. And the decision of the trial court was incorrect in the respect that the court in which the court reached its findings would doubtless have been clearly shown. However, it is not difficult to ascertain how the court reached its finding of \$25,000 damages. The amount found in the contract, \$1,500, was allowed, and the \$300 item for 60,000 bricks, the extra work item for the value of 60,000 bricks was allowed. Appellant was allowed the extra work item for 60,000 bricks. Appellant in its amended statement appellant was entitled to, viz., cash received by plaintiff from appellant, \$25,000; appellant's damages paid by appellant to E. J. Jackson Company for building work, \$75; approximate charges paid by appellant for freight on bricks, \$10; building debris, \$100; for removing brick, 100; for hauling the cost of these bricks, \$15, from 11,000, leaves \$25, the amount allowed plaintiff. The judgment order shows that the court found the same amount as appellant in its counterclaim.

It is again being urged in support of appellant's counterclaim that the trial court should have found that the plaintiff's damages to them the brick salvaged from the wrecked premises appellant was compelled to remove the brick to the dump at a cost of \$100 and was obliged to remove them from the dump at a cost of \$100, and so a result of plaintiff's claim, to show that plaintiff's claim is based on a finding of fact which is clearly shown to be incorrect.

able to employ Chicago brick cleaners at the rate of sixty cents an hour, but the labor union of Wheaton stopped the wrecking work and notified plaintiff that it would not be permitted to wreck the building unless it employed Wheaton laborers on the job, at a dollar an hour, for cleaning the brick. Plaintiff's theory of fact was that it then entered into an agreement with appellant by the terms of which the latter accepted from plaintiff 60,000 brick in lieu of its cleaning the brick. S. B. Lorenzo, president of plaintiff, gave testimony in support of this theory and his testimony is corroborated by that of John Gates and Toby Weinshenker. It is conceded that plaintiff delivered to appellant the 60,000 brick. We think the trial court was justified in finding that plaintiff's theory of fact was sustained by a preponderance of the evidence. Indeed, we find no clear contradiction of plaintiff's testimony, as to the alleged agreement, by any of appellant's witnesses. Appellant's architect, Brydges, testified that he discussed with Lorenzo the question of plaintiff's sending in "substituted brick for brick from the wrecked part." Brydges also testified that some of the brick from the wrecked building were used in the new building. Plaintiff claimed that appellant agreed that as soon as the 60,000 brick were delivered plaintiff would be paid for its work. Lorenzo testified that after the work was finished, the brick delivered, and plaintiff had demanded payment, Richard T. Sullivan, who was in charge of the work for appellant, told him that Mr. Warren, president of appellant, was out of town and that as soon as he returned plaintiff would receive a check in full for its work. While Sullivan took the stand in rebuttal and testified that he did not state to Lorenzo that when Warren returned to town he "would give him a check for the money he claimed owing him," it appears that when Sullivan was called by appellant as a witness in support of the latter's counterclaim he was asked the following question: "Well, these several conversations in September, in Mr. Lorenzo's office,

able to make any further statement at the time of the trial.
 an hour, and the labor union of Boston thought the situation was
 and notified plaintiff that it would not be present at the trial.
 the building union at the time of the trial. Plaintiff's theory of fact
 dollar an hour, for cleaning the hotel. Plaintiff's theory of fact
 was that it then entered into an agreement with defendant by the
 terms of which the hotel accepted from plaintiff \$60,000 worth of
 labor of the cleaning the hotel. S. B. Lorenson, president of plaintiff
 testified, gave testimony in support of this theory and his testimony is
 corroborated by that of John Bates and Toby Schenckman. It is em-
 phatically stated that plaintiff delivered to defendant the \$60,000 check. It
 is thought that the trial court was justified in finding that plaintiff's
 theory of fact was sustained by a preponderance of the evidence.
 Indeed, we find no other contradiction of plaintiff's testimony, and
 to the alleged agreement, by any of defendant's witnesses. Plaintiff
 architect, Brydges, testified that he discussed with Lorenson the ques-
 tion of plaintiff's standing in "substituted check for check from the
 wrecked part." Brydges also testified that some of the check from
 the wrecked building were used in the new building. Plaintiff alleged
 that defendant agreed that as soon as the \$60,000 check was delivered
 plaintiff would be paid for its work. Lorenson testified that after
 the work was finished, the check delivered, and plaintiff was demanded
 payment, Richard T. Sullivan, who was in charge of the work for defendant,
 lent, told him that Mr. Lorenson, president of plaintiff, was one of the
 and that as soon as he returned plaintiff would receive a check in full
 for its work. While Sullivan took the stand in plaintiff's case and testified
 that he did not state to Lorenson that when Lorenson returned to town he
 "would give him a check for the money he claimed owing him," it appears
 that when Sullivan was called by defendant as a witness in support of
 the latter's contention he was asked the following question: "Will

when you were discussing the brick, as you say; was there any talk about payment? A. I think he referred to payment, yes. Q. And, as a matter of fact, you told him that when he sent the 60,000 brick, you would have a check for him, didn't you? A. That is right. Q. That was before he had sent the 60,000 brick, isn't that right? A. Yes, * * * Q. * * * Isn't it a fact that you told Mr. Lorenzo that as soon as Mr. Warren returned, you would have a check for him on the amount due on this contract? A. I don't remember. Q. You wouldn't say that you didn't say that, would you? A. I said I don't remember." Lorenzo's testimony is corroborated by that of John Gates and Toby Weinshenker. The trial court was fully justified in finding that appellant accepted from plaintiff the 60,000 brick in lieu of the latter's cleaning the brick from the wreck, and that appellant agreed to pay plaintiff in full for its work as soon as the 60,000 brick were delivered.

Appellant further contends that plaintiff failed and refused to leave on the site for use of appellant all salvable lumber that appellant was entitled to under the agreement. Plaintiff's evidence was to the effect that it did not remove any lumber from the premises that it was not entitled to under the contract. In support of its contention appellant cites the testimony of Frank Debat, who on direct examination testified that he saw about 10,000 or 15,000 feet of lumber being hauled away on trucks belonging to plaintiff. This testimony is practically worthless in view of certain answers made by the witness on cross-examination. He then testified that he saw but one truck piled with lumber; that he did not take particular notice of how much lumber was in the truck; that the truck held about 6,000 feet of lumber. "Q. How many thousand? A. 4000 or 5000. Q. Did you see any name on that truck? A. No. * * * Q. Well, how did you know of your own knowledge that truck belonged to the Melrose Park Wrecking Company? A. I didn't know the truck was owned by Melrose Park Wrecking Company. Q. Know the color of that truck? A. No. Q. Did you notice any

When you were discussing the truck, as you say, was there any talk about payment? A. I think he referred to payment, yes. . . . a matter of fact, you told him that when he saw the 60,000 brick, you would have a check for him, didn't you? A. That is right. . . . That was before he had sent the 60,000 brick, I don't know. . . . Yes, * * * I don't know if you told him. . . . as soon as Mr. . . . returned, you would have a check for him in the amount due on this contract? A. I don't remember. . . . You wouldn't say that you didn't say that, would you? A. I don't remember. . . . Lorenza's testimony is corroborated by that of John . . . and Tony Weinshenker. The trial court was fully justified in finding that appellant accepted from plaintiff the 60,000 brick in lieu of the latter's cleaning the brick from the work, and that appellant agreed to pay plaintiff in full for the work as soon as the 60,000 brick were delivered.

Appellant further contends that plaintiff failed and refused to leave on the site for use of appellant all suitable lumber that appellant was entitled to under the agreement. . . . It was to the effect that it did not remove any lumber from the premises that it was not entitled to under the contract. . . . In support of its contention appellant cites the testimony of Frank Hobart, who on direct examination testified that he saw about 10,000 or 15,000 feet of lumber being hauled away on trucks belonging to plaintiff. . . . This testimony is practically worthless in view of certain evidence to the contrary on cross-examination. . . . He then testified that he saw that truck piled with lumber; that he did not have personal notice of how much lumber was in the truck; that the truck was about 6,000 feet of lumber. . . . How many thousands? A. About 25,000. . . . How many thousands? A. No. . . . Well, how did you know of your own knowledge that truck belonged to the . . . ? A. I didn't know the truck was owned by . . .

other truck there beside this one you are talking about? A. There were trucks hauling various materials away, I didn't notice particularly what they were. Q. You didn't know whose these trucks were? A. I didn't pay any attention."

We have carefully considered the contention of appellant that the manifest weight of the evidence shows that plaintiff did not fully finish the work required by the contract. The trial court saw the witnesses, heard their testimony, and found that plaintiff did complete the contract. We are satisfied that the evidence warrants that finding.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

trunk were? A. I didn't say any more than
particularly that they were. Q. You didn't know where there
were more things hanging around in there, I didn't notice
other than these people this one was with - Scott A.

we have carefully considered the testimony of Plaintiff that the manifest weight of the evidence shows that Plaintiff did not fully finish the work required by the contract. The trial court now has the witnesses, heard their testimony, and found that Plaintiff did complete the contract. It has concluded that the evidence warrants that finding.

The following is a list of the names of the persons who have been appointed to the various positions in the various departments of the Government of the State of New York, for the year 1900.

5011426

1057-71

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

39509

CATHERINE BILHORN,
Appellant,

v.

GUY A. RICHARDSON and WALTER
J. CUMMINGS, as Receivers of
CHICAGO RAILWAYS COMPANY,
a corporation, and HARVEY B.
FLEMING and EDWARD E. BROWN,
as Receivers of CHICAGO CITY
RAILWAY COMPANY, CALUMET AND
SOUTH CHICAGO RAILWAY COMPANY,
and THE SOUTHWEST STREET RAILWAY
COMPANY, corporations, doing
business as CHICAGO SURFACE LINES,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

292 I.A. 639⁴

MR. JUSTICE SCAMLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued the receivers of certain railway companies doing business under the name of Chicago Surface Lines. A jury returned a verdict finding defendants not guilty. Motions by plaintiff for a judgment notwithstanding the verdict and for a new trial were overruled. Plaintiff appeals from the judgment entered upon the verdict.

Plaintiff's complaint alleges, in substance, inter alia, that defendants on August 25, 1934, were common carriers for hire and reward; that they controlled and operated street cars throughout the city of Chicago, particularly on certain highways known as Milwaukee avenue and Division street; that plaintiff, on the said date, became a passenger of defendants and paid her fare; that it was the duty of defendants to manage, control and operate their cars "so as to avoid running into, striking or colliding said street cars with one another;" that defendants, on the said date, disregarded

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their duty and negligently and carelessly propelled, operated and controlled the said street cars, whereby they were caused to and did run into, strike and collide with great force to, upon and against one another, thereby seriously injuring plaintiff, who was using all due care and caution for her own safety; that as a direct and proximate result of the collision of said street cars she was seriously injured internally and externally and divers bones of her body were then and there broken and dislocated. Plaintiff asked judgment in the sum of \$50,000. It is unnecessary to state the allegations of the second count of the complaint. The sole answer of defendants is: "The defendants, by Frank L. Kriete, their attorney, state that they desire to contest only the nature and extent of the injuries, if any, plaintiff sustained, and the amount of damages, if any."

In our view of this appeal it will not be necessary for us to consider many of the contentions raised by plaintiff in support of her argument that the judgment should be reversed.

Ch. 110, Ill. Rev. Stat. 1937, par. 161, sec. 40, sub-sec.

(4), provides:

"If a party wishes to raise an issue as to the amount of damages only, he may do so by stating in his pleading that he desires to contest only the amount of the damages."

By their answer defendants raised a single issue for the jury to decide. Defendants state: "We agree with counsel that the only issue presented to the jury for decision was whether plaintiff was injured on the street car on the occasion in question, and, if so, to what extent." Plaintiff contended that she was seriously injured as the result of the accident. Defendants state their position as follows: "We do not, however, admit that she was injured at all or to any extent by the street car. Whether or not she was injured at the time and place in question was the primary

their duty and responsibility and accordingly proposed, approved and
 controlled the said report, namely that when asked to say
 the law firm, which was advised to do so, they were not
 against one another, namely regarding liability, who was
 asked all the time and showed the law firm that as a result
 and practice needs of the situation at that time and the
 respective informed themselves and accordingly and direct them to
 body were that the law firm was requested. Liability
 judgment in the case of liability. It is necessary to state the
 allegations of the witness about the situation. The wife
 of defendant (a) was interviewed by Mr. J. Edgar Hoover
 attorney, state that they have in contact with the witness and
 of the interest, it was, financial situation, and the witness of
 it was."

In our view of this report it will not be necessary for me to
 consider many of the statements which are included in regard to
 but comments that the testimony should be reviewed.
 On July 11, 1937, July 12, 1937, July 13, 1937, July 14, 1937,

(d) Questions:

"It is a very simple to state as there is no report of
 charges only, he was not in the position of the
 justice is advised only the name of the company."
 If their names are included in the report for the fact of
 being. Defendant also: "We agree with what the law firm
 issues presented to the fact that defendant was not
 was injured as the report is in the position of liability, but it
 not, as was stated. "Classical defendant also the witness
 injured as the result of the accident. "Defendant was
 position as follows: "We are not, however, with the law firm
 found as all it is not known by the attorney. "Defendant on the
 she was injured as the law firm was placed in position and the witness

issue of fact presented to the jury." The uncontroverted evidence shows that while plaintiff was a passenger on a northwest-bound street car on Milwaukee avenue the automatic switch at Division street failed to function properly, and the car left the northwest-bound track, proceeded to the left on a switch track, and collided with a Milwaukee avenue southeast-bound street car. Plaintiff's testimony tended to show that the two cars came together with great force; that after the collision the car upon which she was riding was wedged into the side of the other car and the "wreck-wagon" was obliged to move the cars apart; that there was a large hole in the side of the other car. Defendants' theory of fact was that the contact of the two cars was not a violent one; that while both of the cars were scratched by the contact there was no hole in the side of the other car after the collision and no glass was broken; that nobody was thrown down in the car in which plaintiff was riding and none of the passengers was injured by the collision; that the southeast-bound car proceeded downtown shortly after the collision and the car upon which plaintiff was riding was sent to the "depot" by the "supervisor;" that the "supervisor" called the wreck wagon to the place of the accident after the collision.

By its verdict the jury found that plaintiff sustained no physical injuries as a result of the collision. Plaintiff strenuously contends that the finding is not only against the manifest weight of the evidence but that it is against certain undisputed evidence. After a careful consideration of the evidence bearing upon the instant contention we are satisfied that it shows beyond a reasonable doubt that plaintiff sustained some physical injuries as the result of the accident. As the case may be tried again we refrain from expressing any opinion as to the nature and extent of the injuries she sustained. It

is difficult to understand how the jury could find that plaintiff was uninjured by the accident unless they were for some reason prejudiced against her. However, it is quite likely that the following improper instructions, given at the instance of defendants, confused the jury:

(19) "A carrier of passengers is only required to exercise the highest degree of care consistent with the practical operation of its business and the mode of conveyance adopted, and is not an insurer of the absolute safety of its passengers."

(2) "It is not sufficient to entitle the plaintiff to recover in this case to show a negligent breach of duty, if any, on the part of the defendants, but it devolves upon the plaintiff to show further that such breach of duty was the proximate cause of her injury, and in no case can a recovery be had for a negligent breach of duty unless the evidence shows that such negligent breach of duty was the proximate cause of the injury to the plaintiff. The term 'proximate cause' as used in these instructions means that cause which is natural and continuous sequence, unbroken by any efficient intervening cause, produces the result complained of and without which that result would not have occurred."

(15) "The fact that the court has submitted this case to the jury for determination should not be taken or considered by the jury as any intimation by the court that the defendants are or are not in any manner liable for the injuries for which this suit is brought. It would be wholly unwarrantable for the jury to understand that fact as implying or intimating that the defendants are or are not in any manner liable in this case or as implying or intimating any opinion by the court upon the question of the defendants' liability." (Italics ours.)

As negligence was admitted, the giving of the foregoing instructions, offered by an experienced attorney, is indefensible. While they stated correct abstract rules of law it was plain that they were entirely irrelevant to any controverted issue and would tend to harm plaintiff's cause of action. Plaintiff points out numerous reasons why the instructions were harmful to her cause of action, but the vice of the instructions is too clear to need comment. The trial court also gave, at the instance of defendants, the following instructions:

(6) "The plaintiff is required by law to prove her case by a preponderance of the evidence before she can recover. If the plaintiff in this case has not so proved her case, or if the evidence is evenly balanced and you are unable to say on which side is the preponderance, then, in either of these cases, the verdict should be not guilty."

This instruction was also harmful to plaintiff, especially in view of the foregoing ones. Her case is stated in her complaint and it is that she was in the exercise of due care and caution for her own safety; that defendants were negligent and ^{as} a direct and proximate result of the negligence she was injured. This last instruction, a mandatory one, requires her to prove her case by a preponderance of the evidence. Such an instruction would have been proper in an ordinary case, but under the instant pleadings plaintiff would prove "her case" if the preponderance of the evidence showed that she sustained injuries as the result of the accident. Defendants argue that all of the foregoing instructions are "stock" instructions and that they did not harm plaintiff because other given instructions correctly stated the law. The argument is not persuasive. A pertinent question is, Why did the experienced lawyer for defendants offer these clearly improper instructions?

We take judicial notice of the fact that the attorney who represents the plaintiff has been attacked in certain appeals taken to this court from judgments in personal injury suits. The members of the bench and bar knew that proceedings have been taken against him before certain of the nisi prius judges of this county. While we express no opinion as to the extent of the damages plaintiff sustained, we are satisfied that the record shows that she is a hard-working, upright woman, and we feel impelled to state that in any future trial of this cause it should be remembered that Catherine Bilhorn, not her attorney, is the plaintiff in the case. It must not be understood from anything that we have said that we are intimating any opinion as to any of the charges that have been made against plaintiff's attorney.

The judgment of the Circuit court of Cook county is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED, AND CAUSE REMANDED
FOR A NEW TRIAL.

39580

GEORGE W. MASON,
Appellant,

v.

CASEY B. SHELTON,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

292 I.A. 640¹

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of replevin against defendant for the recovery of a Pontiac sedan. The replevin writ was served upon defendant and the bailiff turned the property over to plaintiff. The case was tried by the court and there was a finding of right of property in defendant. Judgment was entered that defendant recover from plaintiff the possession of the property replevied and that a writ of retorno habendo issue. Plaintiff appeals.

On December 18, 1935, plaintiff purchased the car in question from Chieftain Motor Sales, Inc., a corporation (hereinafter called Sales Company), under a conditional sales contract, by the terms of which North American Acceptance Corporation retained possession of the Title Certificate bearing plaintiff's name, unassigned, to be surrendered to plaintiff upon the payment of certain instalments by the latter, the last one falling due December 18, 1936. On November 29, 1936, plaintiff, while having his car serviced at Sales Company's place of business, was approached by Busch, an agent for said company, and asked how much he would "stand" for a new car. Plaintiff answered, "\$250." Busch stated that he thought he could negotiate a deal for plaintiff. Plaintiff testified that on November 29, 1936, he talked with Busch at Sales Company's office, where he asked Busch what he

GEORGE W. MASON,
Appellant,

v.

CARLY B. BRINTON,
Appellee.

ATTORNEY GENERAL

STATE OF OHIO

2221A.640

MR. JUSTICE BREWER DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of replevin against defendant for the recovery of a certain wagon. The replevin was granted upon defendant and the plaintiff turned the property over to plaintiff. The case was tried by the court and there was a finding of right of property in defendant. Judgment was entered that defendant and recover from plaintiff the possession of the property replevied and that a writ of replevin be issued. Plaintiff appeals.

On December 14, 1935, plaintiff purchased the car in question from Christian Motor Sales, Inc., a corporation (hereinafter called Sales Company), under a conditional sales contract, by the terms of which North American Automobile Corporation retained possession of the title Certificate bearing plaintiff's name, unassigned, to be surrendered to plaintiff upon the payment of certain installments by the latter, the last one falling due on December 15, 1936. On November 29, 1936, plaintiff, while driving his car, received at Sales Company's place of business, was approached by Busch, an agent for said company, and asked how much he would "stand" for a new car. Plaintiff answered "250." Busch stated that he thought he could negotiate a deal for plaintiff. Plaintiff testified that on November 30, 1936, he talked with Busch at Sales Company's office, where he asked Busch what he

would have to pay for a new 1937 car, the same type as the one that he was driving; that Busch said, "How much will you stand?" to which witness answered, "\$250;" that Busch said, "I think I can fix you up. Go home and talk it over with your wife and I will see you later;" that on December 2, 1936, Busch asked him if he could bring a prospect over to the house to see the car, to which plaintiff answered, "Yes, bring the prospect over," but that "the car ain't to be sold nor title delivered until my new car comes through." On December 1, 1936, Busch took defendant to the home of plaintiff for the purpose of allowing the defendant to inspect the car as a prospective purchaser of it. Mrs. Mason, wife of plaintiff, testified that her husband told her that he had had a talk with Busch regarding the sale of plaintiff's car; that her husband stated to her that he believed he would get a new car as Busch would furnish him one for an additional \$250. She further testified that Busch told her, on December 1, that defendant was a prospective buyer of plaintiff's car and that she then allowed Busch and defendant to inspect the car; that later that evening Busch again called at her home and made out an order on Sales Company to sell plaintiff's car; that as she acted for her husband in business matters she signed the order. It provided that Sales Company should sell to plaintiff one 1937 sedan, to be delivered on or before December 21, 1936, "Type of car traded in 1936 Pont. DeLuxe 2 Door;" the price of the car was fixed at \$845, to be paid as follows: "Cash on Delivery \$285.26 Used Car Allow \$595.00 Used Car Lien \$35.26;" that "title on 36 to be held by customer until 1937 car is delivered to him;" "Buyer's Signature Geo. W. Mason 6348 So. Albany Chicago Ill."

Defendant knew nothing of the terms of the order. Neither plaintiff, his wife, nor Busch made any statement to defendant that would put him on notice that plaintiff reserved, in the order, the title to the car until he received his new automobile from Sales Company. On the

would have to pay for a new 1937 car, the same type as the one that
he was driving; that Busch told, "The money will be ready" to which
witness answered, "Yes"; that Busch said, "I think I can let you go."
Go home and talk it over with your wife and I will see you later;"
first on December 2, 1936, Busch called him at his home telling a message
over to the house to see the car, to which Plaintiff answered, "Yes,"
bringing the prospect over, "and that the car isn't so bad and now it is
delivered until my new car comes through." On December 3, 1936, Busch
took defendant to the home of Plaintiff for the purpose of showing
the defendant to inspect the car as a prospective purchaser of it.
Mrs. Busch, wife of Plaintiff, testified that her husband told her
that he had had a talk with Busch regarding the sale of Plaintiff's
car; that her husband stated to her that he believed he would get
a new car as Busch would furnish him one for an additional \$100.
The further testified that Busch told her, on December 3, that the
defendant was a prospective buyer of Plaintiff's car and that she had
allowed Busch and defendant to inspect the car; that later that evening
Busch again called at her home and made out an order on Ralph C. Gregory
to sell Plaintiff's car; that he also told her husband in confidence
matters she signed the order. It provided that Ralph C. Gregory should
sell to Plaintiff one 1937 sedan, to be delivered on or before December
21, 1936, "Type of car traded in 1936 Ford. Delivery 3 days; 1937 Ford
of the car was traded in 1936, to be paid in 1937; 1937 Ford 1936
1937.16 Used Car Price \$100.00. Used Car Price \$100.00. 1937 Ford 1936
on 36 to be held by defendant until 1937 car is delivered to him."
"Buyer's Signature: Busch. M. Busch. 1936. 1937. 1937. 1937. 1937. 1937.
Defendant knew nothing of the terms of the order. Neither Plaintiff,
his wife, nor Busch made any statement to defendant that would put
him on notice that Plaintiff intended, in the order, the title to the
car was to be transferred to the new owner from Ralph C. Gregory. On the

evening of December 1 Sales Company, through Busch, sold plaintiff's car to defendant and the latter made a small deposit on the car, and the next day plaintiff delivered his automobile to Sales Company. On December 3, after defendant had made further payments on the purchase price, Sales Company delivered the automobile to him. A bill of sale of the car from Sales Company was delivered to defendant on December 5. It is conceded that defendant paid Sales Company in full for the car. Defendant retained possession of the car until it was replevied by the bailiff, on February 2, 1937. From December 1, 1936, until some time in February, 1937, plaintiff and his wife repeatedly requested Sales Company to deliver the new car they had ordered. On December 10 plaintiff turned over to Busch the final instalment money due North American Acceptance Corporation on the old car. Plaintiff and his wife state that they did not say anything to Busch about delivering back their car because they were looking for the new car from Sales Company "every day." Plaintiff admits that he knew on December 21 that Sales Company had sold his car to defendant. It appears that at that time plaintiff and his wife were undecided as to the color of the car they wanted Sales Company to deliver to plaintiff. It is clear from their testimony that after they knew of the sale to defendant they continued to urge Sales Company to deliver to them a new car "right along." Mrs. Mason testified that she demanded a new car in January, 1937. Busch testified that at one time Sales Company had on hand a car that suited plaintiff and his wife and Sales Company was then ready to deliver it to plaintiff but he failed to pay to Sales Company the \$250 cash required by the order, and the car was then sold to another party.

Plaintiff contends that "the Chieftain Motor Sales Company, dealer, had no right, title, interest or authority to sell the Pontiac sedan to the defendant; that the dealer wrongfully sold the said car

evening of December 1, 1937, through the Bureau, both Plaintiff's car to defendant and the latter made a small deposit on the car, and the next day Plaintiff delivered the automobile to defendant. On December 2, after defendant had made further payments on the automobile, Plaintiff delivered the automobile to him. A bill of sale of the car from Plaintiff was delivered to defendant on December 2. It is conceded that defendant paid sales tax on the car. Defendant received possession of the car until it was repossessed by the bank, on February 2, 1937. From December 1, 1936, until some time in February, 1937, Plaintiff and his wife repeatedly telephoned their company to deliver the new car they had ordered. On December 10 Plaintiff turned over to Bush the final installment money on their previous automobile Corporation on the old car. Plaintiff and his wife state that they did not pay anything to Bush about a living - which claim can be proven they were looking for the new car from their company "every day." Plaintiff admits that he knew on December 11 that sales company had sold his car to defendant. It appears that at that time Plaintiff and his wife were undecided as to the offer of the car they wanted. Sales company to deliver to Plaintiff. It is clear from their many statements after they knew of the sale to defendant that they continued to urge sales company to deliver to them a new car "within a few days." Bush testified that she demanded a new car in January, 1937. Bush testified that at one time sales company had on hand a car that suited Plaintiff and his wife and sales company was then ready to deliver it to Plaintiff but he failed to pay to deliver the car and was refused by the car, and the car was then sold to another party. Plaintiff contends that "the Chevrolet Motor Sales Company, dealer, had no title, title, interest or authority to sell the automobile to the defendant; that the dealer wrongfully sold the car to

in contravention of statute in such case provided; that said contract of sale between the dealer and defendant was therefore void and the trial court therefore erred in finding right of property in defendant and on said finding giving judgment to defendant in replevin."

"As a general rule, where the true owner of the property allows another to appear as the owner of or to have full power to dispose of the property, so that a third party is led into dealing with the apparent owner, an estoppel may operate against the true owner which would preclude him from disputing the existence of a title which he has caused or allowed to appear vested in another. Drain v. LaGrange State Bank, 303 Ill. 330." (National Bond & Inv. Co. v. Shirra, 255 Ill. App. 415, 419.)

Under the facts of the instant case, we think the foregoing authority, as well as others that might be cited, disposes of the instant appeal. No demand was made by plaintiff upon defendant to return the automobile until the replevin writ was served, although plaintiff admits that he knew on December 21 that Sales Company had sold the automobile to defendant and that the latter was in possession of the property. Plaintiff and his wife continued to demand a car of Sales Company until January, 1937. Indeed, their testimony is that they continued their demands "right along." Plaintiff's wife was not positive that she had not made a demand on Sales Company in February, 1937. Sales Company finally "folded up." Plaintiff's wife was unable to make a "satisfactory settlement" with it and the replevin suit followed.

Plaintiff contends that "the attempted sale by the dealer to the defendant was in contravention of statute and therefore void;" that "the Motor Vehicle Anti-Theft Law [Uniform Motor Vehicle Anti-Theft Act, ch. 95 1/2, pars. 74-93, Ill. Rev. Stat. 1937] prescribes a certain manner and means for the sale of a motor vehicle and therefore excludes all other means such as the attempted sale by a mere bill of sale which method was used by the dealer in this case when he sold the Pontiac sedan to the defendant." People v. Billardello, 319 Ill. 124, is cited in support of the contention. Neither the Act nor the case cited has any application to the facts in the instant

record.

Plaintiff contends that "the court erred in overruling plaintiff's objection to admission of evidence as to negotiations for compromise or settlement." The contention is based upon two questions asked Mrs. Mason upon cross-examination. The trial court ruled, and properly, we think, that the questions asked upon cross-examination related to a matter that had been gone into upon the direct examination. After reading the direct examination of the witness we are satisfied that the two questions upon cross-examination in no way adversely affected plaintiff's case. Indeed, both sides asked questions, without objection, as to efforts made by plaintiff and his wife for a settlement. The two questions upon cross-examination could be entirely ignored in the determination of the case.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friendly, P. J., and Sullivan, J., concur.

39431

GEORGE W. FAULKNER, doing business
as FAULKNER & COMPANY,
Appellee.

v.

VICTORY MUTUAL LIFE INSURANCE
COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO. (

292 I.A. 640²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action by plaintiff, George W. Faulkner, doing business as Faulkner & Company, to recover damages because of the failure and refusal of the defendant, Victory Mutual Life Insurance Company, a corporation, to pay real estate commissions claimed to be due said plaintiff. The cause was tried by the court without a jury and finding and judgment entered against defendant for \$600. This appeal followed.

Plaintiff's complaint alleged substantially that he was a licensed real estate broker; that in April, 1934, there was an agreement between the parties that if plaintiff procured a purchaser who would pay \$15,000 for the premises located at 3821-23 South Wabash avenue, belonging to defendant, the latter would pay "the regular commission" paid real estate brokers for such services rendered in the City of Chicago; that thereafter, May 23, 1934, pursuant to said agreement, plaintiff did procure the Righteous Supreme Temple of God, a corporation, to purchase said premises for \$15,000; that the defendant accepted such purchaser and entered into a contract with it for the sale of the property; that on or about December 17, 1935, the sale was "consummated *** by and between defendant and the purchaser so procured by the plaintiff;" that the fair, reasonable

39431

GEORGE W. FALKNER, doing business
as FALKNER & COMPANY,

Appellant.

v.

VICTORY MUTUAL LIFE INSURANCE
COMPANY, a corporation,

Appellee.

MR. JUSTICE SULLIVAN delivered the opinion of the court.

This is an action by plaintiff, George W. Falkner, doing business as Falkner & Company, to recover damages because of the failure and refusal of the defendant, Victory Mutual Life Insurance Company, a corporation, to pay real estate commissions claimed to be due said plaintiff. The case was tried by the court without a jury and finding and judgment entered against defendant for \$500. This appeal followed.

Plaintiff's complaint alleged substantially that he was a licensed real estate broker; that in April, 1934, there was an agreement between the parties that if plaintiff procured a purchaser who would pay \$15,000 for the premises located at 3421-23 North Dearborn avenue, belonging to defendant, the latter would pay "the regular commission" paid real estate brokers for such services rendered in the City of Chicago; that thereafter, May 25, 1934, plaintiff so sold the premises, plaintiff did procure the highest net price of \$15,000; that defendant, a corporation, to purchase said premises for \$15,000; that the defendant accepted said purchase and entered into a contract with it for the sale of the property; that on or about December 17, 1935, the sale was consummated; that the sale was procured by the plaintiff; that the fair, reasonable

and usual real estate broker's commission due plaintiff for such service was and is \$600; and that notwithstanding plaintiff's repeated demands for the payment of said commission, defendant persisted in its refusal to pay same.

Defendant's statement of defense denied that it at any time entered into an agreement with plaintiff to pay him a broker's commission for the sale of the property described in the statement of claim and it further denied that it authorized plaintiff to sell said property or that any of its agents had authority to enter into an agreement with plaintiff or any of his agents for such sale. It also denied that plaintiff procured a purchaser for the premises for the purchase price of \$15,000, that plaintiff procured such a purchaser "in pursuance to any agreement made as alleged in plaintiff's statement of claim," and that defendant sold the property to a purchaser procured by plaintiff.

In April, 1934, defendant was the owner of the property located at 3821-23 South Wabash avenue, improved with a church edifice and living quarters. It is undisputed that thereafter a deal was consummated for the sale of this property by the defendant to the Righteous Supreme Temple of God.

Rev. Sally Broy, pastor of the church organization which purchased the property, although admitting that Rev. Jack Hunter, plaintiff's salesman, discussed with her the purchase of the property, as well as the terms upon which it could be and was purchased by her as the agent of the Righteous Supreme Temple of God, that he showed her the premises and that he accompanied her to the office of the defendant when she made the deposit of \$300 earnest money and entered into the preliminary contract for the purchase of the property, testified that John H. Dent, who was then the manager of the real estate department of defendant, was the first person to present to

and hence total property's ownership was plaintiff for such service was and in fact and that notwithstanding plaintiff's repeated demands for the payment of said commission, defendant persisted in its refusal to pay same.

Defendant's answer to plaintiff's complaint that in 1907 time entered into an agreement with plaintiff to pay him a commission for the sale of the property situated in the city of Chicago and it further denied that it admitted plaintiff to sell said property or that any of the agents was authorized to enter into an agreement with plaintiff to sell any of the property for such sale. It also denied that plaintiff procured a purchaser for the property for the purchase price of \$15,000, that plaintiff procured such a purchaser in pursuance to any agreement made or alleged to plaintiff's agent or agent, and that defendant sold the property to a purchaser procured by plaintiff.

In April, 1907, defendant was the owner of the property located at 2001-25 South Federal Avenue, Chicago, and a school building and living quarters. It is undisputed that thereafter said was commenced for the sale of said property by the defendant to the Chicago Avenue Trust Co.

Rev. Kelly Gray, pastor of the church of the Holy Trinity, purchased the property, which building was 100,000 feet, and plaintiff's witness, defendant with the purchase of the property as well as the terms upon which it was sold and was authorized to act as the agent of the Chicago Avenue Trust Co., and the money was the proceeds and that the proceeds were in the office of the defendant when the sale was made of the property and was delivered into the plaintiff's account for the purchase of the property, testified that John M. Smith, who was then the manager of the real estate department of Chicago, was the first person to present to

her the matter of the purchase of this property and that he discussed same with her several times before Rev. Hunter came into the picture. An examination of her testimony discloses an overzealous disposition on her part to impress the trial court that Dent and not Rev. Hunter procured her as the pastor of the Righteous Supreme Temple of God to purchase the property.

John H. Dent testified that he was employed by defendant company as manager of its real estate department since said company was organized in July, 1933, and prior to that time by its predecessor; that as such manager of the real estate department "I rented the property and made repairs and have had charge of selling the property too, putting it in the offices for sale;" that he listed the property with quite a number of real estate firms, including Faulkner & Company; that he told Rev. Hunter that he was the manager of the real estate department of defendant; that the defendant fixed \$15,000 as the price at which it would sell the property, payable "\$1,000 down and terms to suit;" that in April, 1934, he employed Rev. Hunter to procure a purchaser for same at that price; that sometime prior thereto J. W. Mitchem, secretary of the defendant company, had advised him that certain persons had made inquiry concerning the property, but that Mitchem did not at any time inform him that Rev. Sally Broy had made such inquiry or that the persons who did were members of her church and that he had neither met her nor talked to her about the property until "she called me up and told me Mr. Hunter had been there claiming he represented the church and wanted to sell *** the church ***. I told her Mr. Hunter was all right, she might purchase through him;" that Rev. Hunter arranged with Rev. Sally Broy to inspect the church premises; that he "told me that she would be there, and he wanted me to be there;" that on May 23, 1934, the witness found Rev. Hunter with Rev. Sally Broy and some members of

her the matter of the purchase of this property and that she was
 caused some with her several times before now. Hunter was with
 the picture. An examination of her location, elevation and
 overhauled situation in her past to improve the value of the
 that Dent and her son, Hunter, procured her as the power of the
 Righteous Business Temple of God to purchase the property.
 John M. Dent testified that he was employed by defendant
 company as manager of the real estate department since said company
 was organized in July, 1933, and prior to that time by its prede-
 cessor; that on such inventory of the real estate department of the
 the property and made repairs and was in charge of selling the
 property too, putting it in the office for sale; that he listed
 the property with quite a number of real estate firms, including
 Paulsen & Company; that he told Mr. Hunter that he was the manager
 of the real estate department of defendant; that the defendant listed
 \$15,000 as the price at which it would sell the property, payable
 "1,000 down and terms to suit"; that in April, 1934, he employed
 Mr. Hunter to procure a purchaser for same at that price; that some-
 time prior thereto J. E. Michem, secretary of the defendant company,
 had advised him that certain persons had made inquiry concerning the
 property, but that Michem did not at any time inform him that Mr.
 Kelly Brox had made such inquiry or that the persons who did were
 members of her church and that he had neither nor had he talked to
 her about the property until "she called me up and told me Mr. Hunter
 had been there claiming he represented the church and wanted to sell
 *** the church ***. I told her Mr. Hunter was all right, and might
 purchase through him"; that Mr. Hunter arranged with Mr. Kelly
 Brox to list the church property; that he "told me that she would
 be there, and he wanted me to be there"; that on May 23, 1934, the
 witness found Mr. Hunter with Mr. Kelly Brox and some members of

her church in the home office of defendant; that "I was out when he came in with some prospective buyers and then and there they paid \$300 earnest money;" and that the earnest money receipt and contract was then executed for the sale of the property "at the price of \$15,000, to be paid in the following manner: \$1,000 in cash, \$400 quarterly, including interest;" that he first mentioned Rev. Hunter to "other officers of the company" in connection with this property in the spring of 1934; that he told J. R. Mitchem, secretary of defendant company "I had it listed with Hunter, a salesman *** in the spring, early in 1934," prior to the sale of the property to Rev. Sally Broy; that he talked to Mitchem prior to the execution of the earnest money contract "concerning Faulkner & Company;" and that "I told him I thought I had a sale for the place; Mr. Hunter said he had clients he was going to bring *** out *** I told him the Righteous Supreme Temple Church was interested" and he said "all right, let them come forward."

Rev. Hunter testified that in addition to being an ordained minister of the Gospel he was connected with Faulkner & Company as a licensed real estate salesman and specialized in the sale of churches; that Dent informed him in April, 1934, that the board of directors of defendant had fixed the sale price of the property at \$15,000; that Dent said "if you sell it, we will pay a reasonable commission;" that after endeavoring to interest various "preachers" and "ministerial alliances" in the purchase of the property, he called upon Rev. Broy in her church, then located at 39th street and Vincennes avenue; that "I told her I could give her a beautiful deal, a brick building at that time. She said she would look at it that evening. That was quarter of two. I told her the price was \$15,000, \$1,000 down. She asked if I thought a deposit of \$300 would be enough. I went to 3823 and waited. She came over in her car.

her church in the town of Salem; that I was not
 he came in with some prospective buyers and that they
 paid \$300 earnest money; and that the earnest money receipt and
 contract was then presented for the sale of the property "at the
 price of \$11,000, to be paid in the following manner: \$1,000 in
 cash, \$400 quarterly, including interest; and the balance remained
 Rev. Hunter to "other officers of the company" in connection with
 this property in the spring of 1934; that he sold 7.5. 1934,
 secretary of defendant company "it was listed with Hunter,
 salesman "in the spring, early in 1934," prior to the sale of
 the property to Rev. Holly Gray; that he talked to H. H. Hunter prior to
 the execution of the earnest money contract "concerning defendant
 Company;" and that "I told him I thought I had a sale for the place;
 Mr. Hunter said he had already he was going to bring out and I
 told him the defendant company was interested" and he
 said "all right, let them come forward."
 Rev. Hunter testified that in addition to being an ordained
 minister of the Gospel he was connected with defendant company as
 a licensed real estate salesman and specialized in the sale of
 churches; that he had informed him in April, 1934, that the price of
 directors of defendant had fixed the sale price of the property at
 \$12,000; that he said "if you sell it, we will pay a reasonable
 commission;" that when endeavoring to interest various "prospects"
 and "ministerial alliances" in the purchase of the property, he
 called upon Rev. Gray in her church, then located at Main Street and
 Vincennes Avenue; that "I told her I could give her a beautiful deal,
 a brick building at that time. She said she would look at it that
 evening. That was about the 2nd. I told her the price was \$12,000,
 \$1,000 down. She asked if I showed a deposit of \$500 would be
 enough. I went to 3002 and asked. She came over in her car.

I was standing at the door. She walked up to me and I marched her in the church and showed her the Sunday school room. The pastor was occupying the apartment and I got permission to show her through the six room apartment with hard wood floors. I showed her the two kitchens, and she was pleased with everything, she said 'it is just lovely, I'll meet you tomorrow at what time?' I said to her would two o'clock do and I went on that afternoon and told them I would be there the next day with Mother Broy to make a deposit." He further testified that when Dent said to him in April, 1934, "if you sell it we will pay reasonable commission," he also told him "I am manager of the real estate department;" that "before I interested a buyer I went by the Victory Life office" and asked a lady at the information desk there "what authority Mr. Dent had" and she said he "is manager of the real estate;" that when he went to plaintiff's office on May 26, 1934, with Rev. Sally Broy, he did not see Dent, but Mitchem was in the front office; that he said to the latter, "Mr. Mitchem, I am Rev. Jack Hunter connected with Faulkner & Company, this is Mother Broy and her husband *** they went to make a deposit on 3821-23 South Wabash avenue, Old Monumental Congregation" and that Mitchem said, "Mr. Dent is out and he has charge of real estate;" that he waited with the Broys for Dent's return to the office and that "when Mr. Dent came back I proceeded to introduce the folks again to Mr. Dent;" that Rev. Sally Broy "handed \$300 to me and I handed it to Mr. Dent" in Mitchem's presence; that Mitchem took the money from Dent, "went to the back" and shortly thereafter returned with the earnest money receipt and contract, which he handed to me and I in turn handed to Rev. Broy; that at that time I told Mitchem "I had been instructed by Mr. Dent to sell the property" and that "Mr. Dent offered me a reasonable commission *** and I am expecting to be paid;" that Mitchem said "all right or something to that effect;" that when

he next saw Mitchem at his desk in defendant's office, he said to him, "I came to see you about the sale of the Monumental Church, when will you be able to pay the commission" and he said "submit me a bill;" that "I told him I am going to insist that you make it 4%. I went back and reported to Mr. Faulkner. He told me O.K. I got a bill and carried it to Mr. Mitchem. He said that will be all right. I waited two weeks and went back. He said he had no record in the books of the sale. I said 'I am not the bookkeeper, do you want to pay or not?' He said 'I have nothing to pay on,' then I proceeded to Mr. Faulkner." On cross-examination Rev. Hunter testified that when he saw Mitchem in April, 1934, he said "I am connected with Faulkner & Company and Mr. Dent requested me to find a buyer for 3821-23 Wabash avenue and he promised to pay and I expect to be paid;" that Mitchem replied "everything will be all right *** we expect to pay commission for anything sold" and "wrote on a piece of paper about another piece of property for me to sell."

J. E. Mitchem testified in defendant's behalf that as secretary of the defendant corporation he "had charge of the general management of the company's business;" that "Mr. Dent's duties were to manage the real estate, that is, collect the rents, look after repairs, to make some purchases, small items *** necessary expenses *** of our real estate *** collections on mortgages, collections on principal and interest;" that an executive committee composed of seven members of the board of directors "fixed the price for the sale of property and authorized the sales;" that Dent did not advise him that he had listed the property for sale with Rev. Hunter prior to the time the deal was closed with Rev. Broy and that Dent did not advise the executive committee or board of directors of the defendant in the presence of the witness "about having listed the property or having entered into an agreement with Mr. Hunter to sell it prior to the time this deal was closed;" that the first time "he saw Hunter in connection

he next saw Mitchell at his desk in defendant's office, he said to him, "I came to see you about the sale of the defendant's property, when will you be able to pay the commission?" Mitchell told me a bill; "I told him I was going to finish the bill by the 1st of April, I went back and reported to Mr. Hamilton, he told me M.E. I got a bill and carried it to Mr. Hamilton, he said it will be all right. I waited two weeks and went back. He said he had no money in the books of the sale. I said 'I own the bookkeeper, as you want to pay or not?' He said 'I have nothing to pay on,' then I proceeded to Mr. Hamilton. "On cross-examination now, Hamilton testified that when he saw Mitchell in April, 1934, he said 'I am connected with Hamilton & Company and Mr. Hamilton requested me to find a buyer for 3821-23 Wabash avenue and he promised to pay and I agreed to be paid that Mitchell replied 'everything will be all right' we agreed to pay commission for anything sold, and 'wrote on a piece of paper about another piece of property for me to sell.' J. E. Mitchell testified in defendant's behalf that as secretary of the defendant corporation he had charge of the general management of the company's business; that "Mr. Hamilton's duties were to manage the real estate, that is, collect the rents, look after repairs, to make some purchases, small items -- necessarily expenses *** of our real estate *** collections on mortgages, collection on principal and interest; that an executive committee composed of seven members of the board of directors "fixed the price for the sale of property and authorized the sales; that Hamilton did not realize that he had listed the property for sale with Rev. Hunter prior to the time the deal was closed with Rev. Grof and that Hamilton was listed the executive committee or board of directors of the defendant in the presence of the witness "when having listed the property for sale entered into an agreement with Mr. Hunter to sell it prior to the time this deal was closed; that the first time he was present in connection

with this Monumental Church deal" was on May 23, 1934, when he was in plaintiff's office with Rev. Sally Broy, Dent and others; that on that occasion Rev. Hunter did not say anything to him with reference to the deal and did not tell him "that he had been told by Mr. Dent to sell the property and he was expecting a commission;" that just after the deal was closed Hunter "made demand for a commission" and "I told him I had no knowledge of his having interested this purchaser in this property, but if he would submit his bill I would read it to the executive committee;" that Bishop Valentine, treasurer of the defendant company, was present during this last mentioned conversation; that Dent did not "say anything with reference to Rev. Hunter making the sale of the property;" and that Rev. Sally Broy handed the \$300 earnest money directly to the witness.

Robert Valentine testified that he was treasurer of the Victory Mutual Life Insurance Company and that the first time he saw Hunter was when he came to defendant's office after the deal was consummated "to claim commission;" that Mitchem called over to him and said "Mr. Hunter is here for commission;" that "I said to Mr. Hunter 'When did you interview these people who bought this church?' and he said 'I don't know.' I said 'Who gave you authority to sell the property,' and he said 'I don't know,' hesitating. I said, 'Well, if you don't know who gave you authority to sell it, and you don't know when you first interviewed them,' I said 'Mr. Mitchem, we can't consider this case, we have no right to pay any one, we have a right to protect the interest of the Victory Mutual Life Insurance Company.' Mr. Mitchem said 'Mr. Hunter, get a bill and send it in.'"

The first question presented for our determination is whether plaintiff procured the purchaser to whom the sale was made. While there is some conflict in the testimony upon this phase of the case,

it clearly appears that there was ample evidence to warrant the trial court in finding not only that plaintiff's agent procured the purchaser but that his efforts brought about the sale.

It is next claimed that defendant "never employed plaintiff to sell the real estate in question;" that Dent, the agent and employee of defendant, "by whom plaintiff claims to have been employed, had no authority to employ a sub-agent to sell the real estate for the company;" that Dent, the manager of defendant's real estate department, "had no authority to bind the defendant to pay commission for the sale of real estate" belonging to the company; and that the defendant "neither by written or oral agreement nor by ratification or otherwise" obligated itself "to pay the plaintiff for services in the transaction."

As to these contentions, plaintiff's position is that defendant employed him to procure a purchaser for the property; that, even though defendant's agent, Dent, did not have actual authority to employ plaintiff to sell the property, the defendant is bound by the apparent authority which it knowingly permitted Dent to assume and exercise to the same extent that it would be by authority actually granted; and that "whether Dent had authority to employ plaintiff or not, when the defendant consummated the sale with knowledge of plaintiff's agreement with Dent, it ratified the act of Dent in his employment of the plaintiff."

The fact that Dent as manager of defendant's real estate department employed Hunter to sell the property and agreed that plaintiff would be paid a reasonable commission for doing so is uncontroverted. Whether he had authority to bind his principal, the defendant, in so doing must be determined from all the facts and circumstances in evidence. Inasmuch as we have set forth the evidence somewhat fully, it is only necessary to point out a few of what we consider its controlling features. Dent and Hunter both

It is clearly stated that the defendant's conduct is not
trial court in finding that the defendant's conduct was
the defendant and that the defendant's conduct was not
It is not claimed that the defendant's conduct was
till to tell the truth in the trial; that is, the
and employee of defendant, "by whom plaintiff claims to have been
employee, had no authority to employ a sub-agent to sell the
estate for the company; that is, the manager of defendant's real
estate department, "had no authority to bind the defendant in any
contract for the sale of real estate; and that the defendant
and that the defendant "indirectly" acted in only a nominal
by ratification or otherwise, and that the defendant
for services in the transaction."

As to these allegations, plaintiff's position is that de-
fendant employed him to procure a purchase for the property; and
even though defendant's agent, none, did not have actual authority
to employ plaintiff to sell the property, the defendant is bound by
the apparent authority which it is generally recognized that he possesses
and exercise to the same extent that it would be if he actually possessed
the same; and that "whether or not the authority is actually granted or
not, when the defendant contracts with a third person in reliance of plain-
tiff's apparent authority, it is bound by the act of the defendant in the
procurement of the plaintiff's services."

The fact that the defendant's conduct is not
defendant employed him to sell the property and that the
plaintiff would be bound by a reasonable commission for the sale of the
property, is not authority to bind the defendant, and that the
defendant, in so doing, must be deemed to have acted in reliance of
and circumstances in evidence. It is only necessary to point out a few of
evidence covering this. At the only necessary to point out a few of
the evidence covering this. At the only necessary to point out a few of

testified that after the latter's employment by the former to sell the property and before the sale was consummated they apprised Mitchem, defendant's secretary, who as general manager of its affairs unquestionably had authority to act for it, of such employment and agreement to pay commission and that he acquiesced in the arrangement and agreed that the defendant would pay a commission to plaintiff if he procured a purchaser. It is true that their testimony in this regard was denied by Mitchem and it was sought to corroborate Mitchem's testimony by that of the witness ~~Knox~~ ^{Valentine} who testified to a conversation between Mitchem and Hunter, which ~~Valentine~~ ^{Valentine} said he participated in and which he stated occurred sometime after the deal was consummated. Hunter said ~~Knox~~ ^{Valentine} was never present when he talked to Mitchem. However, ~~Knox~~ ^{Valentine's} version of this conversation was that in answer to his questions as to when he interviewed Rev. Sally Broy and as to who authorized him to sell the property, Hunter said "I don't know" and that ~~Knox~~ ^{Valentine} then told Mitchem that no commission should be paid. The inconsistency of ~~Knox~~ ^{Valentine's} testimony is demonstrated by his further statement that Mitchem concluded this conversation by saying, "Mr. Hunter, get a bill and send it in." Even Mitchem testified that Rev. Hunter accompanied Rev. Sally Broy to defendant's office when she deposited the earnest money. In the light of all the other testimony in the record Hunter could not have made the answers imputed to him by ~~Knox~~ ^{Valentine}, and since the latter's testimony is refuted by that of every other witness in the case, including defendant's witnesses, Mitchem and Rev. Sally Broy, it was apparently disregarded by the trial court.

That it was contemplated that a commission would be paid for the sale of the property is shown by the receipt given for the \$300 earnest money deposited by Rev. Sally Broy. But this document was more than a receipt. It was a preliminary contract executed by Mitchem for the defendant and by Rev. Sally Broy for the purchaser

testified that after the factor's withdrawal by the factor he will the property and before the sale was consummated they remained. Mitchell, defendant's attorney, who is general manager of the effective immediately and authority to act for it, of such order- ment and agreement to pay consideration and that he represented in the arrangement and agreed that the defendant would pay a consideration plaintiff if he procured a purchaser. It is true that plaintiff money in this regard was given by Mitchell and it was found to correspond to Mitchell's testimony of the fact that Mitchell testified to a conversation between Mitchell and Mitchell, which Val- entine said he participated in and which he stated occurred sometime after the date of the conversation. Mitchell said Mitchell was never present when he talked to Mitchell. However, Mitchell's version of this conversation was that in answer to his question as to when he interviewed Rev. Billy Bray and as to who authorized him to sell the property, Mitchell said "I don't know" and that Mitchell said Val- entine said no conversation should be held. The fact is that Val- entine's testimony is contradicted by the fact that Mitchell said Mitchell concluded this conversation by saying, "I don't know, but I'll say it is." and Mitchell testified that Rev. Mitchell accompanied Rev. Billy Bray to defendant's office when the defendant the exact money. In the light of all the other evidence in the record there could not have been the money known to the re- Val- entine, and since the factor's testimony is untrue by that of every other witness in the case, including defendant's witnesses, Mitchell and Rev. Billy Bray, it was apparently disregarded by the trial court. That it was contemplated that a transaction would be held for the sale of the property is shown by the receipt given for the 1000 percent money deposited by Rev. Billy Bray, and this document was more than a receipt. It was a preliminary contract executed by

and contained the terms and conditions of the sale. One of its provisions was "in case purchaser fails to comply with the conditions after good title is shown in owner, said earnest money is forfeited as liquidated damages and commission." This document, dictated by someone in the office of defendant's attorney and signed by Mitchem, evidenced defendant's intention to pay a commission. Dent, who was an employee, surely was not entitled to a commission on the sale, and the only person who did or could claim a commission for the sale of this property was Rev. Hunter in behalf of plaintiff.

It is strenuously urged that Dent, the manager of defendant's real estate department, had no authority to employ plaintiff or his agent to sell the property or to bind defendant to pay a commission for the sale thereof. If we assume that it was not shown that Dent had actual authority to employ plaintiff to sell the property, the facts and circumstances in evidence were ample to justify the trial court in finding that not only did defendant knowingly permit Dent to hold himself out as having authority to employ plaintiff and agree to pay him a commission, but that Michem, defendant's secretary and general manager, expressly approved of such employment and personally promised plaintiff that he would be paid a commission if he procured a purchaser for the property. "Where the principal knowingly permits another to hold himself out as his agent and the agent in that capacity exercises authority, the principal is bound to the same extent by the authority assumed and exercised, with the apparent authority of the principal, as by the authority actually granted." (Northern Illinois Coal Corp. v. Cryder, 361 Ill. 274.) "Apparent authority in an agent is such authority as the principal knowingly permits the agent to assume or which he holds his agent out as possessing; such authority as he appears to have by reason of the actual authority which he has;

and continued for years an extensive and profitable business. The sale of the
privileges was in some instances made by public sale and in some
times effected by private sale. It is proper to state, that in some cases the
privileges were sold by public sale and in some cases by private sale. The
privileges were sold in the latter of the two ways and the proceeds were
applied by the State, as directed by the Legislature, to pay a
commission. Some of the employees, however, were not entitled
to a commission on the sale, and the sale between the two or more
claims a commission for the sale of the property was not. These
in behalf of the State.

It is respectfully requested that you advise me as to whether or not I am authorized to sell the property or to take possession of it for my own account. If so, please let me know.

I have been advised by the local authorities that the property is located in the vicinity of the city of New York, and that it is situated on a lot which is owned by the same person who owns the property in question. It is also stated that the property is situated on a lot which is owned by the same person who owns the property in question.

I have been advised by the local authorities that the property is located in the vicinity of the city of New York, and that it is situated on a lot which is owned by the same person who owns the property in question. It is also stated that the property is situated on a lot which is owned by the same person who owns the property in question.

such authority as a reasonably prudent man, using diligence and discretion, in view of the principal's conduct would naturally suppose the agent to possess." (Faber-Musser Co. v. Dee Clay Co., 291 Ill. 240.)

In any event the evidence is conclusive that the defendant ratified the act of its agent Dent in employing plaintiff and it is an established rule of agency that a subsequent ratification of the act of the agent is equivalent to an original authorization. (Vetesnik v. Magull, 347 Ill. 611.) "A corporation may ratify the act of one who assumed to act for it and thus remove the objection of want of authority in the first instance, provided the act be one which could have been legally authorized." (Rosehill Cemetery v. Dempster, 291 Ill. 240.)

Plaintiff was employed by Dent to sell the property. He procured the purchaser to which it was sold. Defendant accepted the benefit of plaintiff's services with knowledge of Dent's contract of employment with him. The facts and circumstances in evidence clearly establish defendant's liability to pay plaintiff a reasonable commission for his services and no claim is made that \$600, the amount awarded by the judgment for such services, is excessive.

Since this case has been reviewed on its merits, it is unnecessary to pass upon appellee's motion to dismiss this appeal, which was heretofore made and reserved to hearing.

For the reasons stated herein the judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

such matter as a technical matter, under Illinois law
discretion, in view of the principle's common-law character.
response the court so holds. (Taylor-Thomas v. The City of
New York, 1908.)

In any event the evidence is cumulative and the defendant
waived the right of the court to exclude it and it is
an established rule of law that a court's exclusion of
the act of the defendant is a violation of an established
(Veternik v. City of New York, 1911.) A corporation may testify
the act of one of its officers is not for it and the officer
tion of one of its officers in the first instance, provided the act
be one which could have been legally authorized. (Veternik v. City of
New York, 1911.)

Again it was suggested by one to call the property. It
procured the property in which it was held. Defendant accepted
the benefit of plaintiff's services which are facts of law and not
trust or estoppel. The facts and circumstances in which
dance clearly establish defendant's liability in this case. A
reasonable conclusion for the jury is that no claim is made that
\$500, the amount sought by the plaintiff, for the services, is
excessive.

Since this case has been reviewed in the past, it is
unnecessary to give upon appeal's motion to dismiss the appeal,
which was granted on appeal and removed to review.
For the reasons stated herein the judgment of the defendant
court of Chicago is affirmed.

THE COURT OF APPEALS.

Illinois, 1911, and 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 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39529

BETTY MARECH and JOSEPH LACINA,
Appellees.

v.

STEVE ZUNCICH, JOHN SOBOTO,
RUDOLPH ZUNCICH and JOHN ZUNCICH,
Defendants.

APPEAL FROM
SUPERIOR COURT,
COCK COUNTY.

On appeal of STEVE ZUNCICH, JOHN
SOBOTO and JOHN ZUNCICH,
Appellants.

292 I.A. 640³

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiffs, Betty Mares (name as amended by leave of court) and Joseph Lacina, to recover damages alleged to have been sustained by them as the result of an assault and battery committed against each of them July 1, 1934, at Willow Springs, Illinois, by defendants, Steve Zuncich, John Soboto, Rudolph Zuncich and John Zuncich. As to the claim of Betty Mares the jury returned a verdict finding defendant John Soboto guilty and assessed her damages against him at the sum of \$25. As to the claim of Joseph Lacina the jury's verdict found defendant Rudolph Zuncich not guilty and defendants Steve Zuncich, John Soboto and John Zuncich guilty and assessed ^{Lacina's} damages against them at the sum of \$1,500. Judgments were entered upon the verdicts and this appeal by defendants Steve Zuncich, John Soboto and John Zuncich seeks to vacate the judgments rendered against them.

Plaintiffs' complaint, after naming defendants, alleged:
"On July 1st, 1934, the defendants at Willow Springs, Cock County,

1900

STYLY MARINE AND OTHERS, INC.

STYLY MARINE, INC. (INCORPORATED)
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Illinois, assaulted the plaintiffs with great force and violence and then and there struck them with fists, clubs and other weapons against the peace of the People of the State of Illinois.

"As a direct and proximate consequence of the misconduct of the defendants as above set forth, divers and severe injuries were inflicted upon the plaintiffs of a temporary and permanent nature; they have suffered and will suffer great pain and anguish; they have spent and will spend great sums of money in endeavoring to be cured of the said injuries; they have been and will be prevented from following their usual occupations and businesses and from performing their duties in and about their ordinary affairs; they have lost and will lose divers and large sums of money which they would have otherwise made and acquired.

"The plaintiff BETTY MARECH asks judgment against the defendants in the sum of FIVE THOUSAND DOLLARS *** and the plaintiff JOSEPH LACINA asks judgment in the sum of TEN THOUSAND DOLLARS ***."

The defendants in their answer jointly and individually denied the material allegations of the complaint.

Briefly stated the evidence offered in plaintiffs' behalf was that on July 1, 1934, they were visiting a portion of the Cook County Forest Preserve at Willow Springs, Illinois; that an organization known as the Ilova Lodge was holding a picnic on that day in a partially segregated picnic grove in said Forest Preserve about two blocks from where plaintiffs and others of their group had originally stopped to play horseshoes; that Rudolph Mares, the husband of Betty Mares and a member of plaintiffs' party, was requested to repair the horn of a car belonging to a person attending the Ilova Lodge picnic; that plaintiffs accompanied Mares to a point near the entrance of the grove in which the Ilova Lodge picnic was being held, where they met some friends with whom they talked while Mares went to fix the horn;

Illinois, assaulted the plaintiff with great force and violence and then and there struck them with fists, clubs and other weapons against the peace of the people of the State of Illinois.

"As a direct and proximate consequence of the assault of the defendant as above set forth, divers and severe injuries were inflicted upon the plaintiff of a temporary and permanent nature; they have suffered and will suffer great pain and anguish; they have spent and will spend great sums of money in recovering to be cured of the said injuries; they have been and will be prevented from following their usual occupation and businesses and from performing their duties in and about their ordinary affairs; they have lost and will lose divers and large sums of money which they would have otherwise made and received.

"The plaintiff hereby claims and demands against the defendants in the sum of TEN THOUSAND DOLLARS and the plaintiff JOSEPH LACINA claims judgment in the sum of TEN THOUSAND DOLLARS."

The defendants in their answer jointly and severally denied the material allegations of the complaint.

Briefly stated the evidence offered in plaintiff's behalf was that on July 1, 1934, they were visiting a portion of the Rock County Forest Preserve at Willow Springs, Illinois; that an organization known as the Iliov Lodge was holding a picnic on that day in a partially sequestered picnic grove in said Forest Preserve about two blocks from where plaintiff and others of their group had previously stopped to play horseshoes; that Joseph LACINA, the husband of DELORE Mares and a member of plaintiff's party, was requested to repair the horn of a car belonging to a person attending the Iliov Lodge picnic; that plaintiff accompanied LACINA to a point near the entrance of the grove in which the Iliov Lodge picnic was being held, where they met some friends with whom they talked while Mares went to fix the horn;

that one Jerry Blaha, one of the committee in charge of arrangements for the Ilova Lodge picnic, then approached plaintiff Lacina and asked him to contribute toward payment of the beer consumed at the lodge picnic; that Lacina said he would not contribute anything as he was not attending the picnic but was merely waiting for his brother-in-law, Mares, to finish repairing the horn; that Blaha, after making some jocular remark to Lacina, left him; that shortly thereafter defendant Soboto, who was associated with Blaha upon the lodge picnic arrangement committee, accompanied by the defendants John Zuncich and Steve Zuncich and others, all of whom were either lodge members or guests at the picnic, accosted Lacina; that Soboto, demanding that Lacina leave the immediate vicinity of the picnic grounds, struck the latter; that John Zuncich and Steve Zuncich then joined ^{Soboto} in severely beating Lacina, Steve Zuncich and Soboto striking him with clubs after he had been knocked to the ground; and that plaintiff Betty Mares, who was in the immediate vicinity, received some blows during the altercation.

Dr. Otto Charles Pino, his attending physician, testified that upon examination he found Lacina "to be suffering with a hemorrhagic left eye *** with a hemorrhagic conjunctivitis or an inflammation of the lower lid of the eye; and his upper and lower front teeth were loosened *** his ribs from the fifth to the twelfth were all sore, and he had multiple contusions *** and abrasions over his back and chest. And the symptomology besides that was of cerebral concussion. The man was complaining of dizziness and nausea, inability to eat, weakness and faintness."

The defense offered was not of provocation, justification or mitigation. The evidence presented in behalf of defendants was to the effect that a brutal and unprovoked assault was made directly upon Lacina, but that none of them participated in same.

The defendants contend (1) that "reversible error was

that one Jerry White, one of the committee in charge of arrangements for the Elvira Lodge picnic, then approached slightly later and asked him to contribute toward payment of the picnic. He said the lodge picnic; that Elvira said he would not contribute anything as he was not attending the picnic but was merely waiting for his brother-in-law, Jerry, to finish visiting the home; that after making some further remarks to Elvira, but that she then directed defendant to go, who was associated with the lodge picnic movement committee, accompanied by the defendant, John Lancel and Steve Lancel and others, all of whom were of the lodge chapter on the day of the picnic, escorted Lancel, then again demanding that Lancel leave the immediate vicinity of the picnic grounds, attack the latter and John Lancel and Steve Lancel, then joined in a verbal beating Lancel, Steve Lancel and Steve Lancel him with clubs after he had been thrown to the ground and that plaintiff Jerry White, who was in the immediate vicinity, received some blows during the altercation.

Dr. Otto Gustafson, M.D., attending physician, testified that upon examination he found Lancel to be suffering from a traumatic injury to the head with a laceration of the scalp on the left side of the head and a laceration of the lower lip of the chin; and his nose and lower front teeth were lacerated and the teeth in the upper jaw were all loose, and he was slightly confused and his vision was dimmed and blurred. The physician's opinion was that the injuries were of a serious nature and that the victim was in danger of death. The man was suffering from a laceration of the scalp and nose, and a laceration of the lower lip and teeth.

The defense offered one set of photographs, purportedly or authentic. The defense proposed in order to determine the effect that a review and inspection of the photographs would have upon Lancel, but that none of them was presented to him.

committed by the Court in allowing in evidence the two photographs purporting to portray the physical appearance and condition of the plaintiff Joseph Lacina, over objection of defendants, without proper foundation or preliminary proof as to the authenticity of the photographs;" (2) that "punitive damages cannot be recovered in an action for assault and battery unless plaintiff proves that the assault was of a malicious and premeditated character;" and (3) that "the verdict of the jury in favor of the plaintiffs is against the manifest weight of the evidence and the verdict in favor of Joseph Lacina is grossly excessive."

Counsel for defendants indulges in a lengthy argument in support of his contention that prejudicial error was committed by the trial court in allowing in evidence two photographs taken two days after the occurrence, one portraying the injured condition and appearance of Lacina's face and the other of his back. Lacina, when shown the pictures, testified that they showed correctly the condition of his face and back at the time they were taken and his attending physician testified that the photographs "correctly portray and represent the condition of this man's back and face about the time I first saw him." It has been repeatedly held that pictures taken under circumstances similar to those testified to here are clearly admissible without the testimony of the photographer who took them. The testimony of Lacina and his physician rendered the photographs competent, the essential test being the correctness of the portrayal of the person, thing or condition represented thereon. The rule under which photographs that are testified to as being correct representations of a person or object are competent as evidence without preliminary proof by the photographer who took them as to the kind of camera used and all of the circumstances in and about their taking is approved in the following language in Wigmore on Evidence, Vol. 2, pp. 97 and 98:

"The objection that a photograph may be so made as to misrepresent the object is genuinely directed against its testimonial soundness; but it is of no validity. It is true that a photograph can be deliberately so taken as to convey the most false impression of the object. But so also can any witness lie in his words. A photograph can falsify just as much and no more than the human being who takes it or verifies it. The fallacy of the objection occurs in assuming that the photograph can come in testimonially without a competent person's oath to support it ***. If a qualified observer is found to say, 'This photograph represents the fact as I saw it,' there is no more reason to exclude it than if he had said, 'The following words represent the fact as I saw it,' which is always in effect the tenor of a witness' oath. If no witness has thus attached his credit to the photograph, then it should not come in at all, any more than an anonymous letter should be received as testimony."

In passing upon the competency of a photograph as evidence in the recent case of Browlie v. Browlie, 357 Ill. 117, our Supreme court said at pp. 123 and 124:

"The proponents were permitted to introduce in evidence a photograph of the deceased testatrix. The evidence shows that the photograph was taken either in the year 1922 or the year 1924. There was a conflict in the evidence as to the physical condition and appearance of the testatrix from 1922 down through 1924. Witnesses who were well acquainted with and familiar with her appearance in the years 1922 and 1924 testified that the photograph was a correct representation of the testatrix in those years. The photograph here was not like a picture taken with the X-ray, which requires a person trained in the science of roentgenology to take the picture or to read the same. No scientific education is necessary to read a photograph reproducing the features and appearance of an individual. Proof of the accuracy of a photograph may be made by the testimony of one who was familiar with the appearance of the person at the time the photograph was taken. (22 Am. & Eng. Ency. of Law, 776.) One of the questions in the case was as to the physical condition of the testatrix at about the time the will in question was made. It was therefore competent to make proof of her personal appearance during the period under investigation. A photograph shown to be a correct representation of the testatrix during such period of time is competent as tending to show her appearance, her vigor, temperament and the apparent strength of character as shown by the picture of herself. (Pritchard v. Austin, 69 N. H. 367, 146 Atl. 188.) The trial court did not err in permitting the photograph to go in evidence."

In answer to defendants' contention that punitive damages cannot be recovered in an action for assault and battery unless it is shown that the assault was of a malicious and premeditated character, it is sufficient to state that the record discloses that it was both alleged and proved that the unprovoked attack made upon Lacina, who was at a public place where he had a right to be and minding his own business, was brutal, vicious, wanton and malicious. The

allegations of the complaint that defendants "assaulted the plaintiffs with great force and violence and then and there struck them with fists, clubs and other weapons" necessarily includes the element of malice.

It is urged that the trial court should not have instructed the jury that plaintiffs or either of them might be awarded punitive damages if it believed from the evidence "that the assault was wanton, reckless or vicious and uncalled for in its character" since punitive damages were not prayed for as such in the complaint. It is not necessary to claim exemplary damages by name, it being sufficient if the facts alleged and proved be such as to warrant their assessment.

(Taneski v. St. Louis M. B. T. Ry. Co., 230 Ill. App. 300.) Defendants next argue that the verdicts returned against them were against the manifest weight of the evidence. It is only necessary to state as to this contention that while the evidence was in sharp conflict it amply supported the verdicts.

In view of the character of the assault made upon the plaintiff Lacina, the number of his assailants and the injuries he suffered, as heretofore set forth, we are of the opinion that the damages awarded him by the jury are not excessive in amount. No question is raised as to the amount of damages awarded plaintiff Betty Mares.

For the reasons indicated the judgments for \$25 in favor of plaintiff Betty Mares and against defendant John Soboto and for \$1,500 in favor of plaintiff Joseph Lacina and against defendants Steve Zuncich, John Soboto and John Zuncich are affirmed.

JUDGMENTS AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

allegations of the defendant and the plaintiff. The plaintiff
also must show that the defendant was aware of the plaintiff's
with this, clear and convincing evidence, necessary to establish the
fact of malice.

It is noted that the plaintiff should not have introduced
the jury that plaintiff's evidence of the fact that the defendant
damages if it believed from the evidence that the defendant was aware
reckless or vicious and malicious for in its conduct which positive
damages were not payable for as much in the complaint. It is not nec-
essary to claim exemplary damages by mere, it being sufficient if the
facts alleged and proved be such as to warrant their recovery.

(Tamm v. St. Louis, Mo., 1911, 200 U.S. 1, 26 S.Ct. 1, 53 L.Ed. 101.)
The court says that the plaintiff recovered against them was against
the manifest right of the defendant. It is only necessary to state
as to this contention that while the plaintiff was in every conflict
it simply repeated the verities.

In view of the character of the remarks made upon the plain-
tiff's motion, the number of the defendant and the plaintiff in the
ed, as heretofore set forth, as one of the questions and the damages
awarded him by the jury are not excessive in amount. No question is
raised as to the amount of damages awarded plaintiff by the jury.
For the reasons indicated the judgment for the plaintiff is

plaintiff's motion and against defendant's motion is overruled and the
\$1,500 in favor of plaintiff's motion and against defendant's
Steve Landon, John Landon and Landon Landon are affirmed.

THOMAS L. LONDON,
Friend, P. L., and Counsel, L. L. Landon.

39569

LOUIS HEINEMAN,
Appellee,

v.

A. J. MOUZAKIOTIS,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

292 I.A. 640⁴

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

On February 11, 1933, plaintiff, Louis Heineman, filed a complaint in forcible detainer in the Municipal court against A. J. Mouzakiotis, defendant, asking for a judgment granting him possession of the third floor apartment in the building at 4014 North Paulina street. In response to summons served upon him, defendant personally appeared in open court on February 17, 1931, at which time the cause was continued until March 18, 1937, when the court, after a hearing without a jury, found that plaintiff had the right to possession of the premises and entered judgment accordingly. On March 29, 1937, defendant presented a motion supported by his verified petition to vacate the judgment, which was denied on the same day. This appeal followed. No brief has been filed in this court by plaintiff.

Defendant's petition to vacate the judgment alleged that this action was commenced on February 11, 1937, and "was based on a five day notice served on the defendant on the 2nd day of February, A. D. 1937;" that "said suit was continued for a hearing until March 18, 1937," at which time judgment for possession was entered and a writ of restitution ordered to issue, said writ of restitution to

39369

LOUIS RICHARD,
Appellee,

v.

A. J. MONSIEUR,
Appellant.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

COURT OF APPEALS

2931 A. 640

MR. JUSTICE ARTHUR J. BURNETT, THE DISTRICT OF COLUMBIA.

On January 11, 1937, at 10:00 A.M., Louis Richard, Appellee, filed a complaint in forcible detainer in the District Court against A. J. Monsieure, defendant, asking for a judgment with the possession of the thing filed against in the building at 401 North Paulina Street. In response to summons served upon him, defendant personally appeared in open court on January 11, 1937, at which time the case was continued until March 11, 1937, when the court, after a hearing without a jury, found that defendant had the right to possession of the premises and entered judgment accordingly. On March 11, 1937, defendant presented a motion supported by his verified petition to vacate the judgment, which was denied on the same day. This appeal followed. No writ had been filed in the court by plaintiff.

Defendant's petition to vacate the judgment alleged that this action was commenced on January 11, 1937, and was based on a five day notice served on the defendant on the last day of January, A. D. 1937, that "said suit was continued for a hearing until March 11, 1937," at which time judgment for possession was entered and a writ of restitution ordered to issue, said writ of restitution to

be "stayed ten days;" that "on February 17, 1937, and prior to the judgment for possession, the plaintiff's counsel accepted \$45, which was the amount claimed in the five day notice;" that "plaintiff's counsel then mailed him a notice stating that he was instructed to get possession and that his lease was terminated;" and that "he is in possession under a holdover tenancy." The petition concluded with an argument as to why the judgment for possession should be vacated and plaintiff's suit dismissed.

No report of the proceedings at the trial of the cause or upon the hearing, if there was a hearing, on defendant's petition to vacate the judgment is included in the record presented to this court. Nor in lieu of such report is there included in the record an agreed written statement of the facts material to the controversy.

Defendant's contentions as stated in his brief are that "receipt of rent by the lessor subsequent to a breach is a waiver of the forfeiture for such breach where the breach consists of nonpayment of rent;" that "the action of forcible detainer is a special statutory proceeding summary in its nature and in derogation of the common law and it follows that the conditions that the statute prescribes in conferring jurisdiction must clearly exist and the mode of procedure provided by it must be strictly pursued;" and that "where a lessee has been led by the conduct of the lessor to believe that a strict compliance with the terms of the lease will not be insisted upon, it would be manifestly unfair to permit a forfeiture of such lease because of the lessee's failure to strictly comply with such terms."

It is readily apparent that the legal questions presented by defendant's contentions cannot be properly determined without an examination of the evidence. Defendant has, it is true, made a state-

be "stayed for five days;" that "on February 17, 1925, and prior to the judgment for possession, the plaintiff's counsel suggested that which was the motion claimed in the five day motion;" that "plaintiff's counsel then asked him a motion claiming that he was entitled to possession and that the house was 'rented' and that 'he is in possession under a leasehold tenancy.' The motion concluded with an argument as to why the judgment for possession should be vacated and plaintiff's suit dismissed.

No report of the proceedings at the trial of the house or upon the hearing, if there was a hearing, on defendant's motion to vacate the judgment is included in the record presented to this court. Not in lieu of such report is there included in the record an agreed written statement of the facts material to the controversy. Defendant's contentions as stated in his brief are that "receipt of rent by the landlord entitles to a breach in a contract of the forfeiture for each breach where the breach consists of nonpayment of rent;" that "the action of federal decision is a special statutory proceeding summary in its nature and in disposition of the common law and it follows that the conditions that the statute prescribes in conferring jurisdiction must strictly exist and the words of procedure provided by it must be strictly pursued;" and that "there a lease has been let by the contract of the landlord to believe that a notice compliance with the terms of the lease will not be admitted upon, it would be manifestly unjust to permit a forfeiture of such lease because of the lessee's failure to strictly comply with such terms."

It is readily apparent that the legal questions presented by defendant's contentions cannot be properly determined without an examination of the evidence. Defendant's brief, it is true, makes a statement

ment of facts in his brief which purports to set forth the evidence produced at the trial, but it is elementary that such a statement can in no wise supply the fatal deficiency caused by the failure to include in the record the report of proceedings at the trial where resort must be had to the evidence to determine the propositions of law relied upon for reversal. Defendant concludes the statement of facts in his brief by saying that "the above facts" are set forth in his petition to vacate the judgment. This is a misstatement. The petition to vacate the judgment, as heretofore set forth, does not even purport to allege all of the facts stated by defendant in his brief as having appeared in evidence at the trial. There was no admission that the facts alleged in defendant's petition to vacate are true and there was no motion to strike same, the legal effect of which would have been to admit the truth of the facts well pleaded therein. By the verification of his petition defendant merely asserted on oath the truth of the facts alleged, and it may well be that when the evidence as to the matters incorporated in the petition was presented on the trial, as it is fair to assume it was presented since it was just as available then, the court found that it was untrue.

In any event it is the established rule that in the absence of a report of proceedings at the trial it must be assumed that the evidence presented to the trial court was sufficient to sustain its finding and judgment.

The judgment of the Municipal court is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

ment of facts in his brief response to the report of the
dances produced at the trial, but it is unnecessary that such a
statement can in no way supply the fatal deficiency caused by
the failure to include in the report of proceedings
at the trial where report must be made to the witness in substance
the propositions of law relied upon for reversal. Furthermore, the
includes the statement of facts in his brief by saying that "the facts
"are set forth in his petition to vacate the judgment. This is
a misstatement. The petition to vacate the judgment, as introduced
set forth, does not even purport to allege all of the facts stated
by defendant in his brief as having appeared in evidence at the
trial. There was no admission that the facts alleged in defendant's
petition to vacate are true, and there was no action in setting
aside the legal effect of which could have been to admit the truth
of the facts well pleaded therein. By the verification of his
petition defendant merely asserted on oath the truth of the facts
alleged, and it may well be that when the evidence as to the facts
incorporated in the petition was presented on the trial, as it is
fair to assume it was presented since it was just as available then,
the court found that it was untrue.

In any event it is the established rule that in the absence
of a report of proceedings at the trial it may be assumed that the
evidence presented to the trial court was sufficient to establish the
finding and judgment.
The judgment of the Municipal Court is affirmed.
THE COURT AFFIRMS.

Wm. H. L. and Corbin, J., concur.

39640

ALFRED K. FOREMAN, Receiver Chicago
Bank of Commerce, a Corporation,
Appellee,

vs.

A. L. MARTIN,

Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

292 I.A. 640⁵

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse an order entered by the Municipal court of Chicago overruling his motion to vacate a judgment entered by confession against him and for leave to appear and defend.

September 21, 1933, plaintiff caused judgment by confession to be entered against defendant on a collateral judgment note executed by him May 23, 1932, due thirty days after date. The note was originally for \$11,776.21, on which a payment of \$2954.89 was endorsed June 15, 1932. The judgment was for \$10,116.75, which included \$523.57 attorneys' fees. Five days thereafter, September 26, 1933, an execution was issued and delivered to the bailiff whose return shows that he demanded payment of defendant on October 16, 1933; thereafter, on December 26, 1933, the execution was returned no part satisfied. April 6, 1937, more than three and one-half years after the judgment was entered and after the return of the execution by the bailiff showing demand had been made on defendant, defendant filed his motion to vacate the judgment and for leave to appear and defend, and on that date filed his verified petition in support of the motion. The petition set up the entry of the judgment, and that the record showed the issuance of an execution served on defendant, but he averred the execution was never served upon him, and that he had no notice that the judgment had been entered until a few days before he made his motion, when he inquired

of the receiver of the Chicago Bank of Commerce (the payee of the promissory note) concerning the collateral he had placed as security for the note with the bank; that he had a "good and meritorious defense to the whole of plaintiff's claim and is not indebted to the plaintiff in any sum whatsoever; nor was your petitioner at the time of the entry of said judgment by confession, nor at any other time indebted to the plaintiff." The petition further set up that defendant's defense was that the statement of claim filed by the receiver of the bank, "did not set forth or allege any authority or appointment of" plaintiff as receiver; that the note on which judgment was confessed was secured by collateral consisting of stocks and bonds and that the receiver or someone acting for him, "sold said collateral at a grossly inadequate price without any notice" to defendant and without making any report to him as to the collateral sold or the amount received therefor, and that by reason of such wrongful conduct by the receiver defendant's rights were "jeopardized and impaired" and his "redemption rights have been clogged", and that the receiver or his agents had by such action rendered defendant liable for the conversion of the collateral; that it was not sold in the open market at the true or market value thereof; that the amount of the judgment was greatly in excess of the amount remaining due on the note, and that if proper credit were given, the note would be paid in full.

On the same day the court entered an order showing the filing of the motion and leave was given plaintiff to file counter affidavits, which were accordingly filed six days thereafter, in which it was denied that the execution had not been served on defendant, denied that defendant did not have knowledge of the entry of the judgment until a short time before he filed his motion, denied that defendant had been diligent in presenting his motion, denied defendant had a meritorious defense, and denied the allegation of the

of the receiver of the Chicago Bank of Commerce, the name of the
promissory note, suggesting the evidence he had given as to the
for the note with the bank; that he had a "good" and satisfactory de-
ference to the name of "Chicago Bank of Commerce" is not intended to be
plaintiff is not an endorsement; but was a mere indication of the fact
of the entry of said judgment by confession, and of no other kind
indicated in the plaintiff's. The plaintiff further said that the
defendant's statement was that the plaintiff was the owner of the
owner of the bank, "and that the plaintiff was the owner of the bank"
assignment of" plaintiff as receiver; that the note was given in
ment was enclosed was enclosed by defendant's confession of what
and that the plaintiff was the owner of the bank, "and that the
said collection of a large amount of money, and that the plaintiff
to defendant and plaintiff and any person or firm or company
said of the amount received in cash, and that by reason of such
written contract by the receiver, defendant's right to the "bank"
dized and impaired" and his "reputation in the bank was impaired,"
and that the receiver of the bank had by such action interfered
defendant liable for the conversion of the bank's money; and that
was not said in the open market of the bank or market value of the
that the bank of the defendant was guilty of the fraud
involving, and in the note, and that it was a fraud and a
the note would be paid in full.
On the same day the court entered an order requiring the
of the motion and leave was given plaintiff to file further affidavits
vita, which were accordingly filed and were admitted, in which it
was stated that the question had not been turned in defendant,
defendant it at defendant did not have knowledge of the entry of the
defendant with a proper time before he filed his motion, stating that
defendant had been diligent in pursuing his motion, stating that
not had a sufficient defense, and stating his intention of the

petition that defendant was not indebted in any sum to plaintiff; and averred the fact to be that on October 22, 1933, which was shortly after the judgment by confession and the return made by the bailiff on the execution, defendant filed his voluntary petition in bankruptcy in the United States District court in Chicago and there scheduled an indebtedness of \$13,000 to plaintiff as receiver of the Chicago Bank of Commerce. The affidavit further alleges that plaintiff sold none of the stocks and bonds pledged as collateral to the note, but that some of the collateral was sold by the bank before it closed, and that the sale was in accordance with the terms of the collateral note; that the last collateral was sold June 15, 1932, and credit of the proceeds was endorsed on the note; that at the time the bank closed there was a balance due of \$8821.32; that the receiver still held bonds of the par value of \$3000 and 32½ shares of stock which were the remaining collateral.

April 20, the court entered an order giving defendant leave to file another affidavit instanter, which was accordingly done. The affidavit is by defendant's counsel who says he prepared defendant's schedule in bankruptcy and that the liability there mentioned, \$13,000 due plaintiff, was "for the purpose of notification of all claimants"; that plaintiff received a proper notice from the bankruptcy court but filed no claim there^{and}/that defendant was thereby led to believe that the note had been fully paid.

Upon the filing of this affidavit the matter was heard by the court, both parties being represented. The only evidence produced by defendant was the testimony of himself and his brother-in-law to the effect that in October, 1933, when the execution purports to have been served on defendant, he was in Wisconsin and not in Chicago; defendant further testified that he was not served with the execution; that he did not know the deputy bailiff whose name appears as making the return on the execution. At the conclusion of

petition that defendant was not indebted in any way to plaintiff;
and overruled the fact as he found on October 22, 1933, which was
shortly after the judgment by confession and the return made by the
plaintiff on the execution, defendant failed his voluntary petition in
bankruptcy in the United States District Court in Chicago and there
scheduled an indebtedness of \$13,000 as plaintiff as receiver of the
Chicago Bank of Commerce. The plaintiff further alleged that the
plaintiff sold none of the stocks and bonds alleged as indebtedness to the
note, but that some of the collateral was sold by the bank before
it closed, and that the sale was in accordance with the terms of
the collateral note; but the fact collateral was sold May 1, 1933,
and credit of the proceeds was included on his note; and at the time
the bank closed there was a balance on of \$10,000.00; and the receiver
still held bonds of the par value of \$10,000 and the value of which
which were the remaining collateral.

April 30, the court entered an order giving defendant leave
to file another affidavit in support of his motion for summary judgment.
The affidavit is by defendant's counsel who says he prepared it and
that a schedule in bankruptcy was filed and plaintiff's motion was
\$13,000 was plaintiff, and "for the purpose of collection of all
elements"; that plaintiff received a notice from the bank
trustee court but filed no claim ~~there~~ and defendant was
led to believe that the note was paid.

Upon the filing of said affidavit the matter was set by
the court, both parties being represented. The ship evidence was
produced by defendant and the testimony of himself and his counsel was
law to the effect that in November, 1933, when the execution was
to have been served on defendant as was in Wisconsin and was in
Chicago; defendant further testified that he was not served with
the execution; that he did not know the identity of plaintiff's name
appears to make the return on the execution. As was explained in

the testimony of these two witnesses (no other evidence having been offered or suggested by defendant) the court denied defendant's motion to open up the judgment and for leave to defend.

Defendant contends that the judgment is void because there is no showing that plaintiff had any capacity to sue and therefore the court was without jurisdiction; that while plaintiff's statement of claim is entitled, "Alfred K. Foreman, Receiver Chicago Bank of Commerce, a Corporation, v. A. L. Martin," there is no allegation in the statement of claim that the receiver was the legal owner of the note, that it bears no endorsement and accordingly there was no transfer of the title of the note to him. We think there is no merit in this contention. It is not necessary that the note be endorsed by the bank to the receiver before he can maintain a suit on a promissory note owned by the defendant. Pfeil v. Loeb, 255 Ill. App. 484. Plaintiff's statement of claim is the printed conventional statement used in confession of judgment cases. It averred that plaintiff was the legal owner of the note, a copy of which was attached to and made a part thereof. In the cited case we quote section 49 of the Negotiable Instruments act which provides that where the holder of a promissory note payable to his order transfers it for value without endorsing it, the transferee may maintain an action on it in his own name. Section 11 of our Banking act, chapter 16a, authorizes a receiver of a bank to sue and defend in his own name with reference to the assets and debts of the bank.

Defendant further contends that the judgment should have been opened up because he was guilty of no negligence in making his motion, that he did so within a few days after he learned a judgment had been entered against him; that the evidence shows he was not served with the execution as the return indicated. We think this contention cannot be maintained. Defendant's note was dated May

the testimony of these two witnesses (no other evidence having been offered or suggested by either of them) is sufficient to establish the motion to open up the judgment and to have it set aside. Defendant contends that the judgment is valid because there is no showing that Plaintiff was any deceived, or was not deceived the court was without jurisdiction; that while Plaintiff's statement of claim is entitled, "Affirmative Statement, Defendant's Answer and Counter, a Corporation, v. J. J. Smith," there is no allegation in the statement of claim that the receiver was the legal owner of the note, that it bears no endorsement and accordingly there was no transfer of the title of the note to him. He claims there is no merit in this contention. It is not necessary that the note be endorsed by the bank to the receiver for it is not within a bill on a promissory note owned by the defendant. Plaintiff's statement of claim is the correct conventional statement used in connection of judgment cases. It avers that Plaintiff was the legal owner of the note, a copy of which was attached to and made a part of the record. It also cites as evidence section 43 of the Negotiable Instruments Act which provides that where the holder of a promissory note presents it to the order transferee it is for value without endorsement if the transferee may maintain an action on it in his own name. Section 43 of our Banking Act, Chapter 104, entitled a provision of a bank is now and acted in the same way with reference to the receipt and issue of the bank.

Defendant further contends that the judgment should have been opened up because he was guilty of no negligence in making the motion, that he did not obtain a few days after he learned a judgment had been entered against him; that the witness known as one who served with the commission on the receipt indicated. He also says Defendant's note was dated

23, 1932, was due thirty days after date, and so far as the record discloses, defendant heard nothing about the payment of this note to the bank until shortly before he filed his petition in April, 1937. And his testimony and that of his brother-in-law that he was in Wisconsin during October, 1933, when the return of the bailiff shows a demand made upon him for payment under the execution, is evasive and we are not at all surprised that the court did not give credence to such testimony. He denied defendant's motion, holding in effect that defendant had been guilty of negligence, and that demand had been made on him for payment of the judgment by the bailiff of the court in 1933. We think this finding is in accordance with the evidence, and certain it is that we would not be warranted in holding that the finding of the trial court, who saw and heard the witnesses, is against the manifest weight of the evidence. Nor are we impressed with defendant's contention that by his affidavit he showed a meritorious defense, nor, apparently, was the trial Judge.

The order of the Municipal court of Chicago is affirmed.

ORDER AFFIRMED.

McSurely and Matchett, JJ., concur.

39684

FRANK A. GROOSS and LOUIS D.
GLANZ, Trustee,

Appellants,

vs.

FRIEDA WRETZKY (also known
as Frieda Uretzky), a widow,
et al.,

Appellees.

APPEAL FROM THE CIRCUIT

COURT OF COOK COUNTY.

292 I.A. 641¹

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Frank A. Grooss and Louis D. Glanz, as trustee, filed their bill to foreclose a trust deed on which there was \$8,000 indebtedness remaining due. The \$8,000 was evidenced by 8 notes owned by diverse persons, one of which was owned by plaintiff, Frank A. Grooss, and one by defendant R. Heyen. The case was referred to a master who took the evidence, made up his report, recommended a decree of foreclosure and that plaintiffs be allowed \$750 for their solicitors' fees. Defendant Heyen filed two objections to the report. The first was that the master had erred in finding that plaintiffs' right to foreclose was complete at the time of the filing of the complaint and that plaintiffs rightfully prosecuted the suit on behalf of all the note owners. The second objection was to the allowance of \$750 solicitors' fees on the ground that they were excessive. The objections were overruled and, on the coming in of the master's report, the chancellor overruled the first objection, sustained the second and reduced the solicitors' fees to \$187.50. He also allowed defendant, Heyen, \$62.50 as and for her solicitors' fees. Plaintiffs appeal from that part of the decree reducing the amount of their solicitors' fees and that part of the decree awarding fees to solicitors of defendant, Heyen.

Counsel for plaintiffs testified that he had been practicing law in Chicago for many years and detailed the services he had rendered, which he testified took more than 50 hours, and that it

FRANK A. CROSS and LOUIS D. GLANZ, Trustees,
Appellants,

vs.

FRANK A. MEYER (also known as Frieda Ustsky), a widow,
et al.,
Appellees.

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF FLORIDA
IN AND FOR THE COUNTY OF DALLAS

Frank A. Cross and Louis D. Glanz, as trustees, filed their bill to foreclose a trust deed on which there was \$1,000 indebtedness remaining due. The \$1,000 was evidenced by 8 notes owned by various persons, one of which was owned by plaintiff, Frank A. Glanz, and one by defendant A. Meyer. The case was referred to a master who took the evidence, made up his report, recommended a decree of foreclosure and that plaintiff be allowed \$100 for their solicitors' fees. Defendant Meyer filed two objections to the report. The first was that the master had erred in finding that plaintiff's share to foreclose was complete at the time of the filing of the complaint and that plaintiff's right to foreclose was not complete at all the time owned. The second objection was to the allowance of \$100 solicitors' fees on the ground that they were excessive. The objections were overruled and, on the basis of the master's report, the chancellor overruled the first objection, affirmed the second and reduced the solicitors' fees to \$100. He also allowed defendant and Meyer, \$25.00 each for her solicitors' fees. Finding the appeal from that part of the decree granting the master's report of \$100 for each party and that part of the decree awarding fees to solicitors of defendant, reversed.

Grounds for plaintiff's contention that he had been prejudiced in law in this case are stated and sustained in the report of the

2021.A.641

would require another 20 hours to finish the matter after the entry of the decree.

It appears that after the suit was brought, defendant, Heyen, filed a petition seeking to remove the trustee and for the appointment of a successor trustee, and after a hearing, the prayer of the petition was denied.

We have considered the record and are of opinion that plaintiffs should be allowed \$500 as and for their solicitors' fees. The issues were not complicated and we think \$500 will be an adequate fee. We are also of opinion that the chancellor erred in allowing \$62.50 to defendant, Heyen, as and for her solicitors' fees. No allowance was made by the master, and no objection was made by defendant to his report on this ground.

That part of the decree of foreclosure appealed from touching the question of solicitors' fees, is reversed and the matter remanded with directions to modify the decree in accordance with what is said in this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely and Matchett, JJ., concur.

would replace another 10 days to finish the water supply in
city of Los Angeles.

It appears that after the war, the following persons, who were active in the movement for the abolition of slavery, were active in the movement for the abolition of slavery:

We have considered the report and our opinion was
that the report should be followed and we are for their collection.

tion was made by reference to the report on the same subject.

Other tests. No attempt was made to test the effect of the different tests. The results of the tests were as follows:

an average of 100. The results of the tests were as follows:

less. The results were not significant and no further work will be

... That part of the opinion of the court is suggested from
touching the question of whether, too, all persons who are
matter mentioned, the direct, as to which the court is accord-
ance with what is said in this opinion.

Wolfe, J. H. 1963. The ecology of the

39488

JOSEPHINE STEVENS, JOHN M. STEVENS
and ROBERT E. DOWLING,
Appellants,

v.

WEST TOWN STATE BANK, a corporation,
et al.,
Defendants.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

CAMERON BARBER and THOMAS B. ROBERTS,
receiver of the Stockholders Liability
of the West Town State Bank,
Appellees.

292 I.A. 641²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiffs in a representative suit brought in equity on behalf of themselves and other creditors of the West Town State Bank, to enforce the constitutional liability of the stockholders to creditors. The appeal is from an order entered February 18, 1937, upon the petition of Cameron Barber, filed January 28, 1937, praying that his liability as a stockholder (determined by decree entered June 7, 1935, to be the sum of \$17,276.41) might be released and discharged upon payment of \$2,000 in cash immediately, and the payment of the further sum of \$750 within one year from that date.

The petition averred the petitioner was the owner of 172 shares of stock in the closed bank of the par value of \$17,200; that petitioner paid \$36,771.37 for his 172 shares of stock; that his income had been greatly curtailed by the closing of the bank; that he was insolvent and unable to pay his debts; that he owned

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the year from 1900 to 1905.

The petition averred that petitioner was the owner of 17 1/2 shares of stock in the closed bank of the date of 11/1/2001; that petitioner paid \$6,771.00 for his 17 1/2 shares of stock; that his income had been grossly curtailed by the closing of the bank; that he was in default and unable to pay his debts; that his own

no property which would be subject to levy; that he was willing to pay \$2,750 for a release and discharge from all liability.

The plaintiff creditors answered denying that the income of Barber had been greatly curtailed and denied that he was insolvent or unable to pay his debts or that he had no property subject to levy. They denied also that the offer of settlement was fair or reasonable.

The court heard the evidence and entered an order finding the facts to be as stated in the petition and ordered the release and discharge of the petitioner upon making the payments offered. This appeal is from that order.

Plaintiffs contend that the order should be reversed as contrary to the evidence because of a denial of a continuance requested at the hearing, because the trial court lacked jurisdiction after the expiration of 30 days from the entry of the decree of June 7, 1935, except to enforce the decree or approve settlements with defendants named in the decree with the consent of plaintiffs.

Plaintiffs contend that sec. 11 of the Banking Act does not authorize the satisfaction of liability under a decree of this kind by the payment of a sum less than the amount found to be due to the creditors; that this section is inapplicable because it authorizes only a composition as distinguished from compromise, and this only prior to the judgment or decree; that any construction of sec. 11 of the Banking act authorizing settlements with insolvent stockholders other than with the consent of the creditors would ^{that} make/act unconstitutional. Further, that from the beginning and throughout the proceedings plaintiffs proceeded entirely under the provision of the constitution without regard to the provisions of the Banking Act; that at any rate the remedy provided by sec. 11 of the Banking Act is permissive only and does not prevent the application of remedies pre-

no property which would be subject to Levy's claim he was willing to pay \$2,750 for a release and discharge from all liability.

The plaintiff creditors answered denying that the facts of Barker had been greatly exalted and denied that he was insolvent or unable to pay his debts or that he had no property subject to Levy. They denied also that the offer of settlement was fair or reasonable.

The court heard the evidence and entered an order finding the facts to be as stated in the petition and ordered the release and discharge of the petitioner upon making the payments offered. This appeal is from that order.

Plaintiffs contend that the order should be reversed on account of the evidence because of a denial of a continuance requested at the hearing, because the trial court lacked jurisdiction after the expiration of 90 days from the entry of the decree of June 7, 1935, except to enforce the decree or approve settlements with the defendants named in the decree with the consent of plaintiffs.

Plaintiffs contend that sec. 11 of the Banking Act does not authorize the restriction of liability under a decree of this kind by the payment of a sum less than the amount found to be due by creditors; that this section is inapplicable because it is applicable only to a corporation or partnership, and this only prior to the judgment or decree; that the restriction of sec. 11

of the Banking Act authorizing settlement with individual creditors is other than with the consent of the creditors would not be unconstitutional. Further, that from the petition and grounds for the setting aside the decree it appears that the plaintiff creditors proceeded mainly under the provisions of the constitution without regard to the provisions of the Banking Act; that at any rate the remedy provided by sec. 11 of the Banking Act is pre-missive only and does not prevent the application of remedies pro-

viously existing under the constitution, and that the provision of the statute relied on by petitioner is not, therefore, applicable. The brief of plaintiffs argues all these propositions at great length and with numerous citations of authorities. An examination of the record, however, discloses that with the exception of the contentions that the findings and order are contrary to the evidence, that the court was without jurisdiction, and that the court erred in denying a request of plaintiffs for continuance, other questions not having been raised in the trial court may not be successfully contended for here. Holmes v. First Union Trust and Savings Bank, 362 Ill. 44; Off v. Exposition Coaster, 336 Ill. 160; Lewy v. Standard Elevator Co., 296 Ill. 295; Novotny v. Acacia Mut. Life Ins. Co., 287 Ill. 361; Chicago Title & Trust Company v. Cohen, 284 Ill. App. 181.

Upon the oral argument it was stated by counsel for the ~~res-~~^{creditors} ~~pective~~ parties that a cause was then pending in the Supreme court, the decision of which would be determinative of the questions raised upon this appeal. The cause referred to was that of Frank Burket et al. v. The reliance Bank & Trust Co. et al., Docket No. 24100. It was suggested that the decision of this case should await the determination of that appeal. An opinion was filed in that cause by the Supreme court on October 15, 1937. From an examination it appears the points here made as to the construction and validity of the Banking act were presented to the Supreme court; that the Supreme court held a constitutional question was involved; that it had jurisdiction and declined to transfer the cause to the Appellate court. It did not, however, find it necessary to decide the precise points presented further than to say that the orders there appealed from were entered on the petition of the defendant stockholders without evidence; that the record did not support the orders of the trial court, and that the creditors had not had a judicial hearing before

their rights arising under the decree were modified. For that reason the orders were reversed and the cause remanded. In effect, by inference, we think the court overruled the contention of the creditors against the validity of the statute and their construction of it. In view of that decision and upon this record there remain three questions for our decision. First, whether the court had jurisdiction to hear the petition of Barber. Plaintiffs are not precluded from raising any question as to the court's jurisdiction of the subject matter although that point was not made in the trial court. Jurisdiction of the subject matter may be raised at any time and at any stage of the proceeding. Conover v. Gatton, 251 Ill. 587; People v. May, 276 Ill. 332; Oakman v. Small, 282 Ill. 360; Town of Kingston v. Anderson, 300 Ill. 577; and Village of Glencoe v. Industrial Commission, 354 Ill. 190. Plaintiffs do not contend that the court was without jurisdiction to enter the decree of June 7, 1935, and that decree expressly reserved jurisdiction of the cause with other things for the purpose of considering and passing upon all questions which might thereafter arise with respect to the enforcement of the decree, "and the compromise and settlement of all liabilities in accordance with the Statute in such cases made and provided." We hold the court had jurisdiction of the subject matter.

The second question is also controlling and is one of fact, namely, whether the record justifies the settlement and discharge of the petitioner from a debt of \$17,200 upon the payment of \$2750.

The defendant is an attorney-at-law but has not practiced his profession actively. He resides at 232 South Ridgeland avenue, Oak Park, and has lived there since 1914. It is a stucco house, 2½ stories high, with basement, and contains eight rooms. This property was originally purchased by defendant's wife for \$9250. As part of the purchase price a mortgage of \$4000 was assumed, which

their rights arising under the doctrine were nullified. For that reason the orders were reversed and the cause remanded. In effect, by inference, we think the court overruled the contention of the creditors against the validity of the estate and their corresponding of it. In view of that decision and upon this record there remain three questions for our decision. First, whether the court had jurisdiction to hear the petition of bankruptcy. This is not precluded from raising any question as to the court's jurisdiction of the subject matter although such point was not made in the first court. Jurisdiction of the subject matter may be raised at any time and at any stage of the proceeding. Shawyer v. Shawyer, 221 Ill. 587; People v. May, 278 Ill. 332; People v. May, 278 Ill. 330; Town of Wheaton v. Wheaton, 221 Ill. 577; and Wheaton v. Wheaton, 221 Ill. 577. It is also held in Shawyer v. Shawyer, 221 Ill. 587, that the court was without jurisdiction to enter the order of June 7, 1932, and that decree expressly reserves jurisdiction of the cause with other things for the purpose of conducting and disposing upon all questions which arise thereafter upon the merits to the enforcement of the decree, "and the respondents and settlement of all liabilities in accordance with the findings in this case made and provided." We will now turn to the jurisdiction of the court matter.

The second question is also controlling and is one of fact, namely, whether the record justifies the conclusion and findings of the petitioner from a debt of \$17,500 upon the payment of \$2,500. The defendant in an affidavit of law has not produced his profession actively. He resides at 235 South Madison Street, Oak Park, and has lived there since 1914. It is a stone house, of stone light, with basement, and contains eight rooms. This property was originally purchased by defendant's wife for 1920. As part of the purchase price a mortgage of \$10,000 was obtained, which

was paid and released in 1919. The property was held in joint tenancy by petitioner and his wife for a considerable time prior to June 2, 1931. On that date, just eight days prior to the closing of the bank, the title to the property was by conveyance placed in the name of Mrs. Barber alone. At the time the bank closed on June 10th, the petitioner was a director of the closed bank and Vice President. He was receiving a salary of \$7000 annually. For several years prior thereto his total income was \$15,000 a year. Upon the closing of the bank a bondholders' committee for the handling of certain foreclosures growing out of the real estate bond issues sold by the bank was organized and he became secretary of the committee. Since that time he has drawn a salary of \$250 a month for his services as such secretary. He is now acting as receiver in several foreclosures of these real estate bond issues, and in the six years since the bank closed the fees in these receiverships have amounted to from \$1500 to \$2000 a year. He owns a Chrysler automobile, 1936 model, which is unencumbered and for which he paid \$950. He has cash on hand of over \$1000 and a bank account of \$511.19. He has in life insurance policies which are free from loans \$24,000. The loan value of these policies is more than \$5000. He says that the policies do not reserve the right to change the beneficiary, but the policies were not produced at the hearing, and plaintiffs were given no opportunity to inspect them or verify defendant's statements as to their loan value, etc. Prior to the closing of the bank petitioner and his wife had a joint trading account with Harris, Winthrop and Company, brokers. They had a large margin account at one time and there were a good many transactions. Petitioner was not able to give the details of these. He says that at times he borrowed from his wife and made investments in the stock market; that in connection with these

was well and relieved in 1911. The company was then in
tenancy by petition and his wife had a commission and that in
June 2, 1911. On that date, said petition was filed in the
of the bank, the title to the property was by mortgage. I was in
the name of Mrs. James Wilson. At that time the bank owned on June
1911, the petition was a statement of the closed bank and Vice
President. It was receiving a report of \$1000 monthly. The
first year that interest on the loan was paid, was \$1,000 a year.
Upon the closing of the bank a committee, consisting of the
handling of certain interests was given, out of the total estate
bank assets sold by the bank was \$100,000 and the balance
of the committee. It was then that the bank was sold of
\$200 a month for his services as such secretary. It was then
as receiver in several instances of these real estate and in-
come, and in the 12 years since the bank closed the time in years
receiverships were amounted to him about \$1000 a year. He
owns a Chrysler automobile, 1910 model, which is unencumbered and
for which he paid \$200. He has some on hand in New York and a
bank account of \$20,000. He has in his personal affairs which
are three from 1908 to 1911. The total value of these policies is
more than \$5000. He says that the policies he has received are
right to change the beneficiaries, and the policies were not changed
at the hearing, and beneficiaries were given no opportunity to inspect
them or verify statements of witnesses as to their value, etc.
Prior to the closing of the bank petition was filed with a
joint finding account with James Wilson and Company, Boston.
They had a large margin account at the time and were very a good
many transactions. Petitioner was not able to give the details of
these. He says that at that time he received from his wife and made
investments in the stock market; that in connection with these

stock transactions he borrowed \$14,000 from his wife and still owes her that amount. This liability to his wife and the liability established by the decree against him in this case is his only indebtedness. The receiver was present at the hearing and by his attorney strongly urged the settlement. He was formerly a receiver for the bank and is now acting as deputy receiver. He has constant dealings with the defendant in reference to the real estate bond issues. The attorney for the receiver has some 60 foreclosures of these bond issues, so that the receiver and his attorney and the petitioner have constant business and financial relations with each other. The receiver has not hitherto made any serious efforts to collect this judgment. He has not proceeded either by garnishment or creditor's bill. He was of the opinion that he had taken out an execution, but the evidence is not clear on that point. His attitude upon the hearing indicates a friendly interest in the petitioner. As plaintiffs point out, the averments of the petition as to insolvency, assets and liabilities, etc., were stated in the most general terms. Upon the hearing the attorney for the receiver produced a financial statement made by petitioner and apparently this was the first information plaintiffs had of the statement. It was not offered or received in evidence. The attorneys for plaintiffs asked for an adjournment of the hearing because the defendant had not produced his wife as a witness as he had promised to do, because the testimony disclosed his ownership of life insurance policies which were not produced by him, and because there had been no opportunity to check up on the trading account of petitioner and his wife. Notwithstanding these requests the court proceeded to enter the order accepting the proposition of defendant as recommended.

It is apparent from an examination of the whole record that

stock transactions in January, 1932. This is the only
 one that is not. This finding is in line with the finding
 established by the expert report of this case in the only de-
 fection. The receiver was present at the hearing and as his
 attorney strongly urged the receiver's testimony, he was obviously a receiver
 for the bank and is not acting as a party. The bank's
 dealings with the receiver in reference to the receiver's bond
 issues. The attorney for the receiver was one of the witnesses of
 these bond issues, and that the receiver was the attorney and the
 petitioner have constant contact and financial relations with each
 other. The receiver was not allowed to make any further efforts to
 collect this judgment. He has not proceeded since to collect
 or creditor's bill. He has not proceeded since to collect
 an execution, but the witness is not under any obligation. His
 attitude upon the matter indicates a friendly interest in the
 petitioner. He has not proceeded since to collect or creditor's bill
 as to himself, assets and liabilities, etc., were stated in the
 most general terms. From the hearing the attorney for the receiver
 produced a financial statement made by the receiver and accordingly
 this was the first information given of the statement. It
 was not offered or received in evidence. The attorney for the
 title asked for an affidavit of the receiver, but the receiver
 had not produced his affidavit as a witness and he was not allowed to do
 because the testimony indicated the receiver's attitude of life insurance
 policies which were not evidence of life, and because there had been
 no opportunity to take up on the standing account of the receiver
 and his life. Accordingly these receiver's bond issues produced
 to enter the receiver's testimony of the receiver of the receiver
 recommended.

It is apparent from an examination of the whole record that

evidence in the possession of the petitioner or within his power to produce was not placed before the court, and that the order was entered without sufficient information to disclose that it was justifiable. The burden of proof was upon the petitioner. It was for him to establish the averments of his petition by a preponderance of the evidence. We hold that it was error to enter this order over the objection of plaintiffs without producing the insurance policies for examination, the wife as a witness, and giving to plaintiffs the opportunity to examine her and the joint account of herself and her husband. The order will therefore be reversed and the cause remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

O'Connor, P. J. and McSurely, J., concur.

evidence in the possession of the defendant or which was known to
produce was not placed before the jury, and that the latter was
entered without sufficient information to decide that it was
justifiable. The burden of proof was upon the defendant. It was
for him to establish the elements of his position of a reasonable
ance of the evidence. He said that it was error to enter this error
over the objection of plaintiff's without producing the evidence
policies for examination, the wife as a witness, and living in
plaintiff's the opportunity to examine her and the joint account of
herself and her husband. The other will therefore be reversed and
the cause remanded for proceedings consistent with this opinion.

REVEREND AND HONORABLE

O'Connor, P. J. and Murphy, J., concur.

39531

MARGARET DELYDA, as Administratrix of
the Estate of ANTON DELYDA,

Appellee,

vs.

METROPOLITAN LIFE INSURANCE COMPANY,
a corporation,

Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

292 I.A. 641³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action upon a life insurance policy and upon trial by jury there was a verdict for plaintiff in the sum of \$2,043.99. The court overruled motions of defendant for a new trial and in arrest and entered judgment from which the defendant appeals. The policy in question issued September 27, 1927. It was a "limited payment life policy". It was payable to the estate of Anton Delyda and provided that the insured pay annual premiums in the sum of \$60.62 for thirty years. The policy provided that after premiums had been paid for two full years, the owner or assignee upon written request and presentation of the policy for legal surrender or endorsement within three months after default in payment of premiums, should be entitled to three options: (a) To receive the cash surrender value of the policy less any indebtedness. (b) To have the insurance continued in force from the due date of premium in default for a reduced amount of non-participating Paid-up Whole Life Insurance, payable at the same time and under the same conditions, for such an amount as the net sum described under (a) would purchase at the then attained age of the insured when applied as a net single premium. (c) To have the Insurance continued in force for a reduced amount from the due date

MARGARET CLARK, as administratrix of
the Estate of JAMES CLARK,

vs.

vs.

THE CLARK TRUST COMPANY,
a corporation,
Respondent.

2921 A. 841

IN SENATE, JANUARY 1, 1925.

In an action upon a life insurance policy and upon this
by Mrs. Clark there was a request for judgment in the sum of \$1,000.00.
The court overruled motions of defendant for a new trial and in
arrest and entered judgment in favor of the plaintiff. The
policy in question issued September 27, 1921. It was a "limited
payment life policy". It was payable to the estate of James
Clark and provided that the insured was entitled to receive in the
sum of \$50.00 for thirty years. The policy provided that after
premiums had been paid for two full years, the owner or assignee
upon written request was guaranteed in the policy for cash
surrender or withdrawal within three months after default in pay-
ment of premium, should be entitled to three options: (a) To
receive the cash surrender value of the policy less the interest
thereon. (b) To have the interest continued in force upon the date
of premium in default for a reduced amount of pre-

participating policy with interest, payable at the death
time and under the same conditions, the sum of money as the net
sum described under (c) would produce in the same amount and at
the interest when applied to a reduced amount from the date
interest continued in force for a reduced amount from the date

of premium in default as non-participating Paid-up Term Insurance. If after default in the payment of premium, the owner assignee should not avail himself of one of the above options within three months after the due date of the premium in default, the policy would be continued by the company for a reduced amount of non-participating Paid-up Whole Life Insurance, as provided under option (b). The policy also provided that the company, on assignment of the policy and presentation of it for endorsement, would loan to the owner or the assignee of record on the sole security thereof, an amount not greater than the cash surrender value at the end of the current policy year, and that any indebtedness to the company at the date of said loan together with interest in advance on the loan to the end of the current policy year, and any unpaid premium or premiums for the current policy year would be deducted from the amount of the loan, which should bear interest at the rate of 6% per annum. At the option of the company, the granting of a loan might be deferred for a period not exceeding ninety days after application unless the loan was to be applied solely to the payment of premiums due to the company. The policy also provided for the participation of the assured in the divisible surplus and that "no Agent is authorized to waive forfeitures, to alter or amend this Policy, to accept premiums in arrears or to extend the due date of any premium". A substantially similar provision was printed on the back of the policy. Also on the back of the policy a statement has been stamped to the effect that it has been assigned to the defendant company as a sole security for a loan, the unpaid amount of which and of the interest thereon is a lien against the policy, and

of premium in default of non-payment of premium. If after default in the payment of premium, the other conditions should not avail himself of one of the above options within three months after the date of the premium in default, the policy would be continued by the company for a reduced amount of non-participating paid-up whole life insurance, as provided under option (b). The policy also provided that the company, on assignment of the policy and presentation of it for endorsement, would loan to the owner or the assignee at its discretion on the sole security thereof, an amount not greater than the cash surrender value at the end of the current policy year, and that any interest due to the company at the date of said loan together with interest in advance on the loan to the end of the current policy year, and any unpaid premium or premiums for the current policy year would be deducted from the amount of the loan, which should bear interest at the rate of 6% per annum. At the option of the company, the amount of a loan might be deferred for a period not exceeding ninety days after application unless the loan was to be applied solely to the payment of premiums due to the company. The policy also provided for the participation of the assured in the dividend surplus and that "no Agent is authorized to make a loan, to alter or amend this Policy, to accept premiums in arrears or to assign the date of any premium". A substantially similar provision was printed on the back of the policy. Also on the back of the policy a statement has been stamped to and effect that it has been assigned to the defendant company as a sole security for a loan, the unpaid amount of which and of the interest thereon is a lien against the policy, and

that possession of the policy as evidence of such security has been waived by the company. Defendant concedes all annual premiums upon this policy were paid up to September 27, 1933. The assured died August 23rd of the following year. It is the contention of the defendant that the policy lapsed because of the non-payment of premiums on September 27. The evidence for defendant shows that the policy on that date had a cash surrender value of \$216.00; that there was then outstanding a loan indebtedness against it to the amount of \$206.02, leaving a net equity to the assured of \$9.98; that on the date of the lapse a dividend was payable to the assured of \$12.42, which amount together with the net equity due to the assured in the absence of an election by the assured, was used by defendant to purchase Paid-up Insurance to the amount of \$48.00. This sum with interest defendant admits it owes and contends that this is the full extent of its liability. The plaintiff, however, contends that within the three months limit on November 12, 1933, there had accrued on the policy as its cash loan value and in dividends an amount exceeding all loans and sums due for premiums in order to maintain the policy in force up to September 27, 1934; that on November 12, 1933, defendant, by one of its agents, requested the insured not to cash in the policy, which he was about to do, but to borrow a sum sufficient to continue the policy in force until September 27, 1934; that defendant presented to the insured a note representing the sum to be borrowed, which the insured signed and delivered to the defendant; that thereupon the defendant returned and delivered to the insured the policy with the certificate to the effect

that it was so extended, and thereby, plaintiff says, defendant waived all requirements as to the payment of premium on the due date as well as all defenses upon which otherwise it might have relied, including the right to forfeiture of the policy for non-payment of premiums. Plaintiff also claims that prior to the lapse of the policy, viz. on or about September 20, 1933, the insured presented the policy to the defendant and requested it to pay him the cash surrender value thereof; that defendant took the policy and thereafter, on or about November 12, 1933, by its agent, persuaded the insured not to surrender the policy but to borrow a sum sufficient to pay the premium and leave the policy in force for another year. Plaintiff says the policy was not in default because under the terms of it defendant was obliged to make loans to the insured up to the specified loan value of the policy, which was its cash surrender value. Plaintiff also avers that at this time the cash or loan value of the policy was \$256.00, and that the amount of loans outstanding in favor of defendant was only \$90.00; and that it was the duty of defendant to apply the dividends and cash value of the policy to the payment of premiums accruing on or before October 27, 1933. Plaintiff, therefore, contends that the defendant waived the payment of the premiums and is liable for that reason.

These contentions raise issues of fact, which make necessary a review of the evidence. The plaintiff at the time the policy issued was forty years of age and a Lithuanian by birth. He conducted a small tailoring business at 3551 South Halsted Street in the City of Chicago. The principal office of the defendant insurance company is in New York. It conducted a Chicago office at 47th Street

that it was so intended, and accordingly, plaintiff says, defendant waived all requirements as to the payment of premium on the day date as well as all other conditions, and plaintiff is liable therefor. Plaintiff also claims that after the payment of premium, plaintiff also claims that after the date of the policy, viz., on or about November 10, 1925, the insured presented the policy to the defendant and requested it to pay him the cash surrender value thereof; that defendant took the policy and thereupon, on or about November 10, 1925, it did amount, persuaded the insured not to surrender the policy but to borrow a sum sufficient to pay the premium and leave the policy in force for another year. Plaintiff says the policy was not a valid document under the terms of its defendant was obliged to make loans in the insured up to the specified loan value of the policy, which was the cash surrender value. Plaintiff also claims that on or about the cash or loan value of the policy was \$100.00, and that the amount of loans outstanding in favor of defendant was only \$20.00; and that it was the duty of defendant to apply the dividends and cash value of the policy to the payment of premium and to return the balance of \$80.00, which was, according to plaintiff, the cash value of the policy, to the insured. Plaintiff also claims that on or about November 10, 1925, it did amount, persuaded the insured not to surrender the policy but to borrow a sum sufficient to pay the premium and leave the policy in force for another year. Plaintiff says the policy was not a valid document under the terms of its defendant was obliged to make loans in the insured up to the specified loan value of the policy, which was the cash surrender value. Plaintiff also claims that on or about the cash or loan value of the policy was \$100.00, and that the amount of loans outstanding in favor of defendant was only \$20.00; and that it was the duty of defendant to apply the dividends and cash value of the policy to the payment of premium and to return the balance of \$80.00, which was, according to plaintiff, the cash value of the policy, to the insured. Plaintiff also claims that on or about November 10, 1925, it did amount, persuaded the insured not to surrender the policy but to borrow a sum sufficient to pay the premium and leave the policy in force for another year. Plaintiff says the policy was not a valid document under the terms of its defendant was obliged to make loans in the insured up to the specified loan value of the policy, which was the cash surrender value. Plaintiff also claims that on or about the cash or loan value of the policy was \$100.00, and that the amount of loans outstanding in favor of defendant was only \$20.00; and that it was the duty of defendant to apply the dividends and cash value of the policy to the payment of premium and to return the balance of \$80.00, which was, according to plaintiff, the cash value of the policy, to the insured.

and Ashland Avenue. Of this office Maurice Paskind was an assistant manager working under the direction of Mr. Glynn. Nathan Goldberg was also an employee in that office. This office transacted the business of what was known as the McKinley Park District of the defendant company in Chicago. The merits of plaintiff's case are based upon the assertion as a fact that the loan value of the policy at and after its lapse for failure to pay premium on September 27, 1933, exceeded the amount of the premium due upon the policy in order to carry it another year. Plaintiff offered no direct evidence on this point but questions the sufficiency of defendant's proof to show that on November 12, 1932, the previous loans which are conceded to have been made were increased by a further loan, bringing the total amount of loans up to \$195.76. The testimony of Mr. Kraus of the defendant company, who was in charge of the loan division records, shows that a first loan of \$50.04 was made to pay the annual premium on the policy due September 27, 1931. This loan was \$10.58 less than the amount of the premium because a dividend of that amount was due on the same date and was applied in reduction of the premium. Another loan was made November 20, 1931, which with the previous loan and interest thereon brought the total amount loaned up to \$90.00. A check for the balance on this loan of \$39.80 was paid to the assured by the defendant. Thus far there is no controversy.

The evidence of defendant shows that on December 15, 1931, another loan was made which brought the total amount of the loan up to \$140.00. The items of this loan included the previous loan of \$90.00, interest thereon, and as defendant claims, a payment to the policyholder of \$49.63. Defendant drew its check for this amount. It appears to have been endorsed, and we think a clear preponderance of the evidence indicates that the insured obtained payment thereon. The

and Ashland Avenue. Of this office building was an assistant manager working under the direction of Mr. Wilson. Wilson's company was also an employee in that office. This office transacted the business of what was known as the Building Loan Division of the defendant company in Chicago. The records of defendant's company are based upon the assumption as a fact that the loan value of the policy at and after its issue for failing to pay premium on November 15, 1935, exceeded the amount of the premium due upon the policy it failed to carry it another year. It will appear to direct attention to this point but questions the sufficiency of defendant's proof to show that on November 15, 1935, the previous loan which was assigned to have been made were increased by a further loan, which the total amount of loans up to \$152.55. The testimony of Mr. Wilson of the defendant company, who was in charge of the loan division records, shows that a first loan of \$50.00 was made to pay the annual premium on the policy due September 27, 1931. This loan was \$50.00 less the amount of the premium because a dividend of that amount was due the same date and was applied in reduction of the premium. Interest thereon brought the total amount loaned up to \$70.00. A loan was made November 30, 1931, which with the previous loan and interest thereon brought the total amount loaned up to \$90.00. A check for the balance on this loan of \$20.00 was paid to the company by the defendant. Thus far there is no controversy. The evidence of defendant shows that on December 15, 1931, another loan was made which brought the total amount of the loan up to \$140.00. The items of this loan assigned the previous loan of \$90.00 interest thereon, and as defendant claims, a payment to the policyholder of \$40.00. Defendant asks its case for this amount. It appears to have been admitted, and we think a direct presentation of the evidence indicates that the amount stated is correct. In

court, however, erroneously, as we think, refused to admit the check in evidence. There was undisputed evidence by Mr. Paskind to the effect that the assured at one time raised a question as to whether he had received payment upon this check. Apparently the assured did not have a bank account of his own. The check of November 21, 1931, for \$39.80, in addition to the supposed endorsement of the assured bears the endorsement of "Shampay Bros., Klever Shampay Karpet Kleaners". The other check for \$49.63, dated December 17, 1931, bears a purported endorsement of the assured and also a similar endorsement of "Shampay Bros., Klever Shampay Karpet Kleaners". Mrs. Delyda testified that the written endorsement of the name of the assured is not in his handwriting. This may be so, but we think he got the proceeds of the check. Mr. Stengel of the Shampay Karpet Kleaner Corporation testified that the corporation did a rug cleaning business. It had bought out Shampay Bros., another similar concern, and the consolidated company adopted the stamp "Shampay Bros. and Klever Karpet Kleaners" which was used in endorsing checks. Mr. Stengel testified that one of the endorsements on each of the checks was the regular endorsement of his corporation. He also testified that his corporation did a wholesale cleaning business; that his driver, who dealt with the assured, brought in these checks; that as to one of the checks (he was not sure which) he called up the assured and asked him about it, and the assured explained telling him that he had made a loan from the insurance company.

Mr. Paskind testified the assured made some complaint about one of these checks; that he thereupon took photostatic copies of both checks to the shop of the assured. This was some time in November, 1932; that after some conversation with the assured, the assured

court, however, erroneously, in its ruling, refused to admit the evidence. There was no evidence of any kind, however, that the amount of one thousand dollars was received by him had received payment on this check. Apparently, the witness did not have a bank account of his own. The check of November 22, 1931, for \$28.80, in addition to the supposed endorsement of the witness bears the endorsement of "Shirley Mrs. Kleener, January 19, 1932". The other check for \$28.80, dated December 17, 1931, bears a purported endorsement of the witness and also a witness endorsement of "Shirley Mrs. Kleener, January 19, 1932". Delia testified that the witness endorsement of the check of the amount is not in his handwriting. This may be so, but we think we got the proceeds of the check. Mr. Starnes of the witness testified Kleener Corporation testified that the corporation did not receive business. It had bought out Shirley Mrs. Kleener, and the consolidated company adopted the name "Shirley Mrs. Kleener Kleener Kleener" which was used in corporate checks. Mr. Starnes testified that one of the endorsements on each of the checks was the regular endorsement of his corporation. He also testified that his corporation did a wholesale clothing business; that the driver, who dealt with the witness, brought in these checks; that one of the checks (he was not sure which) he called up the witness and asked him about it, and the witness explained telling him that he had made a loan from the witness's company.

Mr. Starnes testified the witness made some inquiries about one of these checks; that he thought the bank had paid it; that both checks to his shop of the witness. There was some time in 1931.

told him not to bother, to drop the matter entirely; that maybe he "got the money". Paskind asked him (if he was positive that he did not get the check) to sign a statement to the effect that his endorsement thereon was forged and told him in that case the defendant would reimburse him. The assured refused to sign the forgery statement. In the usual course of business a check of this kind would be delivered to the insured personally. Defendant kept in the Chicago office a check register which would show the agent who handled this matter. The agent was out of defendant's service. Paskind also says he asked the insured if the signature on the back of this check for \$49.63 was his, and he said it was. We think a preponderance of the evidence indicates the assured got the proceeds of this check.

This loan of November 12, 1932, increased the previous loan of \$140.00 to \$195.76, and the money obtained was used to pay the annual premium on the policy which was due September 27, 1932. The items out of which the total of this loan was made up consisted of the previous loan of \$140.00, plus interest of \$10.26, plus the amount of the premium of \$60.62, less the September 27, 1932, dividend of \$12.50. This loan ^{certificate} is in evidence. It is witnessed by Nathan Goldberg. Goldberg says he saw the assured write his name on this certificate; that on that particular day he told the assured that his policy was going out of grace and he wanted him to revive it. The date, September 17, 1932, which now appears on this certificate was not on when it was signed, nor a further date of January 11, 1934. Goldberg took the loan certificate to the office and it was sent to New York. The certificate bears the number of the assured's policy, the date of the loan and the amount of it, \$195.76, which it was customary to fill in at the New York office. It was customary in defendant's business to

told him not to bother, as they had better wait; that money is
"not the money". "Waiting around for it (as he was waiting) may be all
not get the check) to him a statement to the effect that the check
ment thereon was forged and told him in that case the defendant could
reimburse him. The assured refused to sign the forged statement.
In the usual course of business a check of this kind would be delivered
to the insured personally. Defendant kept in the Chicago office a
check register which would show the amount and number of checks.
The agent was out of defendant's service. Testimony also says he asked
the insured if the signature on the back of this check was \$50.00 was
his, and he said it was. He filed a representation of the evidence
indicates the assured not the proceeds of this check.
This loan of November 12, 1932, increased the previous loan
of \$140.00 to \$190.75, and the money obtained was used to pay the
annual premium on the policy which was due September 27, 1932. The
items out of which the total of this loan was made up consisted of
the previous loan of \$140.00, plus interest of \$50.75, plus the amount
of the premium of \$50.68, less the amount of \$7, 1932, dividend of
\$12.50. This loan is an evidence. It is evidenced by a check signed
Goldberg says he saw the assured write this check on this certificate;
that on that particular day he told the assured that this policy was
paid out of force and he asked him to revive it. The date, September
17, 1932, which now appears on this certificate was not on when it
was signed, nor a further date of January 11, 1933. Goldberg took the
loan certificate to the office and it was sent to New York. The certificate
bears the number of the assured's policy, the date of the loan
and the amount of it, \$190.75, which is the amount to fill in at
the New York office. It was sent to defendant's business in

issue a loan certificate for each successive loan which included the amount of all loans to the date of the certificate. The certificate for the previous loan was then returned to the policyholder. Assuming the amount of this last loan to be correct, it is undisputed that upon the lapse of the policy on September 27, 1933, the assured was entitled only to the sum of \$48.00 in Paid-up Whole Life Insurance as per option (b).

On November 14, 1933, the assured signed an application for reinstatement. It was taken by Mr. Paskind, who signed as a witness. The application states that the policy had lapsed for non-payment of premium due. Paskind's testimony is that at that time the assured delivered the policy to Mr. Paskind, that he also signed a loan form; that Paskind took the form, the policy and the application and sent same to New York; that in December, 1933, he returned the policy to the assured together with the loan form and told him that it would take \$9.00 and some cents to complete the transaction and keep the policy in force; whereupon, the insured stated that he did not care to pay any money at all. The witness says he left the loan form together with the policy with the assured.

On January 27, 1934, the defendant mailed to the insured at his address, 3551 South Halsted Street, Chicago, a notice to the effect that policy 5-078-526A had lapsed on September 27, 1933, for non-payment of premium, and that the same was being continued as a participating Paid-up policy for the amount of \$48.00. The notice also stated that the policy might be reinstated for the original amount of insurance upon production of evidence of insurability, satisfactory to the company, and the payment of overdue premiums with interest to the date of reinstatement. The notice suggested that if the policy was not reinstated the notice should be attached thereto, and that the assured should keep defendant advised of any future change in residence.

issue a loan certificate for each successive loan which exceeded the amount of all loans to the date of the certificate. The certificate for the previous loan was then returned to the policyholder. The amount of this last loan to be covered, it is indicated that the lapse of the policy on November 27, 1933, was covered was entitled only to the sum of \$40.00 in addition to the \$100.00 insurance as per option (b).

On November 14, 1933, the insured signed an application for reinstatement. It was taken by Mr. Paskind, who signed as a witness. The application states that the policy had lapsed for non-payment of premium due. Paskind's testimony is that at that time the insured delivered the policy to Mr. Paskind, that he also signed a loan form; that Paskind took the form, the policy and the application and sent same to New York; that in November, 1933, he returned the policy to the insured together with the loan form and said that he would take \$2.00 and some cents to complete the transaction and pay the policy in force; whereupon, the insured stated that he had not come to pay any money at all. The witness says he left the loan form together with the policy with the insured.

On January 24, 1934, the defendant called on the insured at his address, 3551 North Western Street, Chicago, a notice to sue after that policy 5-073-3551 had lapsed on November 27, 1933, for non-payment of premium, and that the same was being continued as a variable paying paid-up policy for the amount of \$40.00. The notice also stated that the policy might be reinstated for the original amount of insurance upon production of evidence of insurability, satisfactory to the company, and the payment of various amounts with interest to the rate of reinsurance. The notice suggested that if the policy was not reinstated the notice should be ignored, and that the

or post office address.

On April 15, 1934, Goldberg took an application from the assured for a \$500.00 industrial policy. His testimony is to the effect that there was no conversation about the old policy. Question No. 19 in the application was: "Is said Life now insured in this Company? If not insured, state "No." If insured, give the following details of all Policies in force. No. of Policy., Yr. of Issue, Age at Issue, Amount of Ins., Prem., Plan." The answer is "None". Margaret Delyda, the wife of insured, after the death of her husband made proof of death under this industrial policy. It is witnessed by Nathan Goldberg and is sworn to by her. To question No. 13 which was: "Was deceased insured in any other company or society? If so, state names of companies or societies and amount of insurance and dates of policies in each", appears the answer "No". In support of her contention that the agents of the defendant waived the payment of the premium for September, 1933, Mrs. Delyda testified that at the request of the assured, in August, she went to defendant's office to see about turning in the policy for cash; that she saw Paskind; that she had the policy with her and informed him that her husband would like to cash in the policy, and that Paskind told her not to do it and added that he wished to speak to her husband; that Paskind requested her to leave the policy with the company and said that he would later come to see her husband; that in November, 1933, Paskind came to her husband's place of business, returned the policy and receipt and said it was no use cashing in the policy, that it had been in force since 1927 and "it will be all right yet for one more year until 1934". She says that at that time Paskind produced a note for signature and when leaving remarked, "Well, tailor, when you croak you are prepared"; that he left a receipt and a receipt book and the policy which had been given to him in August, and also a statement that the

or post office address.

On April 18, 1934, Goldberg took an application from the insured for a \$500.00 industrial policy. His testimony is to the effect that there was no conversation about the life policy. When No. 19 in the application was: "Is your life now insured in this company? If not insured, state "No." It insured, give the following details of all policies in force. No. of policy, No. of issue, Age at issue, amount of ins., term, plan. The answer is "None". Margaret Delia, the wife of insured, after the death of her husband made proof of death under this industrial policy. It is witnessed by Nathan Goldberg and is sworn to by her. The question is: which was: "was deceased insured in any other company or society? If so, state name of company or societies and amount of insurance and dates of policies in force", appears the answer "No". In support of her contention that the date of her husband's death was beyond of the premium for September, 1933, Mrs. Delia testified that at the request of the insured, in August, she went to defendant's office to see about turning in the policy for cash; that was not permitted; that she had the policy with her and intended that her husband would like to come in the policy, and that Nathan said that he was not and added that he intended to speak to her husband; that following requested her to leave the policy with the company and said that he would later come to see her husband; that in November, 1933, Nathan came to her husband's place of business, returned the policy and receipt and said it was no use coming in the policy, that it had been in force since 1932 and "it will be all right for you now some time until 1934". She says that at that time Nathan produced a note for signature and when leaving remarked, "well, sailor, good you took the policy"; that he left a receipt and a checkbook book and the policy which had been given to him in August, and also a statement that the

policy was in force for one more year, stating, "it shows the policy will be good." She testified that this receipt as well as the receipt book relating to her industrial policy of \$500 were put in a cupboard, and that in April, 1934, while a demonstrator was demonstrating some moth preventive a fire ensued in which these papers were destroyed.

A witness named Langolf, who says he is a carpenter who resided near the insured's tailor shop, testified that on November 14, 1933, he brought a suit of clothes to the shop of assured to have it cleaned; that he was there when Paskind called. He says that Paskind took the policy from his pocket and also a receipt and said: "Here is your policy. He loaned some money; you want cash. I got the policy. The premium is paid for '34." That he gave the policy to the assured together with another small piece of paper. He says the insured did not at any time say to Paskind that he should keep the policy. Mrs. Delyda testified there was no loan obtained from defendant in December, 1931; that there was no payment to her husband of the \$49.63 as evidenced by the check, and that the signature appearing thereon was not his signature. Her evidence, as well as that of Langolf, who seems a very unreliable witness, is denied by Paskind and Goldberg, with whom she says she talked. Upon the whole evidence we deem the testimony of both Langolf and Mrs. Delyda improbable. Assuming, which we do not doubt, the truth of the facts as shown by the records of the defendant's office there was a prior loan upon the policy to the amount of \$195.76. Such being the fact it is impossible to believe that the agents of defendant undertook to extend this policy in the manner indicated by plaintiff's evidence. No adequate motive appears for a disregard of positive instructions. The plaintiff's testimony as to the fire is without corroboration.

This oral evidence tending to show waiver or estoppel is contradicted by every written document and rendered improbable by all the circumstances in evidence. We think the jury was confused. The verdict is clearly and manifestly against the weight of the evidence. For this reason the judgment will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

O'Connor, P. J., and McSurely, J., concur.

This oral evidence leading to show that the witness is correct-
dicted by every witness concerned and rendered impossible by all the
circumstances in evidence, we find the fact was established. The
verdict is clearly and undeniably against the weight of the evidence.
For this reason the judgment will be reversed and a new trial
for another trial.

REVEREND AND HONORABLE

O'Connor, J., and McManus, J., concur.

39706

HENRY CLAUSEN, a minor, by his
father and next best friend,
HARRY CLAUSEN,

Appellant,

v.

ALBERT VARRIN and AUGUSTA VARRIN,
Appellees.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

292 I.A. 641^u

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

October 30, 1935, the minor plaintiff filed his complaint in an action on the case for personal injuries sustained April 30, 1935. He named as defendants Albert Varrin and Augusta Varrin. Summons issued; the sheriff served both defendants November 21, 1935. December 1, 1936, both defendants were defaulted for want of an appearance, and December 9, 1936, judgment against them was entered for \$4,500.

February 18, 1937, defendants by leave filed a petition to vacate and set aside the judgment and March 11, 1937, an amended petition. March 30, 1937, an order was entered vacating the default, setting aside the judgment and giving leave to file their appearance in 20 days and to answer the complaint. From that order plaintiff has perfected this appeal.

The petition to vacate was filed more than 30 days after the entry of the judgment, it was based upon sec. 72 of the Civil Practice act (Ill. State Bar Stats., 1937, chap. 110, p. 2406.) That section provides that the same relief may be obtained under it as was available under the writ of error coram nobis at common law. Plaintiff answered the amended petition but offered no evi-

39708

HARRY GILBERT, a minor, by his
father and next friend,
HARRY GILBERT,

Appellant,

ALBERT VARNIN and AUGUST VARNIN,
Appellees.

MR. JUSTICE MANTON delivered the opinion of the court.

October 30, 1935, the minor plaintiff filed his complaint
in an action on the case for personal injuries sustained April 25,
1935. He named as defendants Albert Varnin and August Varnin.
Summons issued; the parties agreed both before and after October 30,
1935. December 1, 1935, both defendants were defaulted for want
of an appearance, and December 9, 1935, judgment against them was
entered for \$4,200.

February 12, 1937, defendants by leave filed a petition to
vacate and set aside the judgment and March 11, 1937, an amended
petition. March 30, 1937, an order was entered vacating the de-
fault, setting aside the judgment and giving leave to file their
appearance in 30 days and to answer the complaint. From that answer
plaintiff has perfected this appeal.

The petition to vacate was filed more than 30 days after
the entry of the judgment. It was based upon Sec. 73 of the Illinois
Practice act (Ill. Stat. Ann., 1937, chap. 110, p. 2404.)
That section provides that the same relief may be obtained under
it as was available under the writ of error coram nobis or coram
legibus. Plaintiff answered the amended petition but offered no evi-

STATE OF ILLINOIS
COUNTY OF COOK

39708

dense in support of the answer, and the cause seems to have been heard upon agreement that the averments should be taken to be true. Essentially the proceeding was in the nature of a motion by plaintiff to strike the petition. It seems now to be settled that although 30 days or the term of court has expired a defendant may by written motion under sec. 72 have a judgment obtained by fraud, accident or excusable mistake without negligence on his part, set aside. Jacobsen v. Ashkinaze, 337 Ill. 141, 168 N. E. 647; People v. Crooks, 326 Ill. 266, 280, 157 N. E. 218; People v. Green, 355 Ill. 468, 473, 189 N. E. 500.

The material facts appearing from the amended petition are that defendants, Albert and Augusta Varrin, and the parents of the minor plaintiff, Mr. and Mrs. Harry Clausen, are neighbors in Chicago. The Varrins live at No. 5277, the Clausens at No. 5234 Liano avenue. April 30, 1935, at about 11 o'clock a. m., plaintiff, Henry Clausen, son of the Clausens, was injured by a Buick automobile owned by defendants and driven by their son, Albert. The injured boy was taken to the Swedish Covenant Hospital and there placed under the care of Dr. O. T. Roberg. May 3, 1935, Mr. and Mrs. Varrin and Mr. and Mrs. Henry Clausen entered into an agreement in writing which recited the above facts and provided "the party of the first part hereby assumes all responsibility for paying all the expenses connected with Henry Albert Clausen's stay and treatments in the Swedish Covenant Hospital and possible care after he has left the hospital, also the doctor's bill. The party of the second part hereby agrees to sign a full release to the party of the first part as soon as the doctor in charge declares the patient has completely recovered. It is also agreed to that after the doctor has declared the patient fully recovered the party of the second part has no claim whatsoever and waives all demands." This agreement was signed by Mr. and Mrs. Varrin and by Mr.

denies in support of the answer, and the answer seems to have been heard upon argument that the evidence should be taken to be true. Essentially the proceeding was in the nature of a motion by plaintiff to strike the petition. It seems now to be settled that although 50 days on the term of court was expired a judgment may be written motion under 200. It seems a judgment obtained by fraud, account of fraudulent witnesses without notice in the case, set aside. Jacobson v. Jacobson, 337 Ill. 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200.

The material facts appearing from the amended petition are that defendants, Albert and Gustav Varrin, and the parents of the minor plaintiff, Mr. and Mrs. Henry Clausen, are residents in Chicago. The Varrins live at No. 3277, the Clausens at No. 3234 Madison Avenue. April 30, 1932, at about 11 o'clock a. m., plaintiff, Henry Clausen, son of the Clausens, was injured by a truck belonging to the defendants and driven by their son, Albert. The injured boy was taken to the Swedish Government Hospital and there placed under the care of Dr. O. T. Roberts. May 3, 1932, Mr. and Mrs. Varrin and Dr. Roberts entered into an agreement in writing which stated the above facts and provided "the party of the first part hereby assumes all responsibility for paying all the expenses connected with Henry Clausen's stay and treatment in the Swedish Government Hospital and possible care after he has left the hospital, and the doctor's bill. The party of the second part hereby agrees to sign a bill for same to the party of the first part as soon as the doctor is able to declare the patient has completely recovered. It is also agreed that after the doctor has declared the patient fully recovered the party of the second part has no claim on doctor and agrees all demands." This agreement was signed by Mr. and Mrs. Varrin and by Dr.

and Mrs. Clausen and was acknowledged May 3rd before a notary public. In conformity with that agreement the Varrins between May 4, 1935, and December 30, 1936, paid to the Swedish Covenant Hospital items totalling \$336. May 8, 1935, they paid to a nurse for nursing the injured boy \$56. December 10, 1935, they paid to Mr. Clausen on account of the bill of Dr. Roberg \$100, and on April 15, 1936, a further sum of \$50. August 28, 1936, the further sum of \$50, making a total of \$200 paid on account of the doctor's bill and total sum of \$592 paid under the terms of this contract. August 13, 1935, the attorneys for plaintiff, as the attorney for Mr. and Mrs. Clausen, wrote defendants calling their attention to certain unpaid bills, and said:

"We shall have to insist that either one or both of you take care of these matters immediately, and in the event that you fail to do so, we shall have to take such legal steps as we find necessary to effect the collection for the above bills.

"Kindly advise us what disposition you intend to make of this matter."

Upon receipt of this letter, Mrs. Varrin went to the office of the attorneys and talked with Mr. McBride of that office. She told him that when she was through paying the hospital bill she would start to pay the doctor. McBride urged her to make larger payments. He made no other claim than under this contract. Again November 22, 1935, after summons had been served on petitioners, Mrs. Varrin again went to the office of the attorneys and again talked with McBride. She said: "Why do you want \$10,000? The boy is all right now. Mr. Clausen always told us he wanted no other money except for us to pay the bills." Thereupon McBride said: "You have not paid all the bills. Can you pay something immediately on the nurse and doctor bills?" On the same evening, Mr. and Mrs. Varrin went to the Clausen home, and Mrs. Varrin said: "What are you trying to get \$10,000 for? Why do you take us to court?" To which Harry Clausen replied, "The lawyer did this. The lawyer has the matter in his hands.

and Mrs. Olsen and was acknowledged by the doctor's secretary
 available. In connection with that agreement the doctor's secretary
 May 4, 1935, and December 20, 1935, paid to the Swedish Government
 Hospital items totaling \$360. May 4, 1935, they paid to a nurse
 for nursing the injured pay \$25. December 19, 1935, they paid to
 Mr. Olsen on account of the bill of Dr. Robert Lind, and on April
 15, 1936, a further sum of \$25. In that way, the doctor's
 of \$50, making a total of \$500 paid on account of the doctor's bill
 and total sum of \$535 paid under the terms of this contract. August
 15, 1935, the attorney for Lind, as the attorney for Mrs. and
 Mrs. Olsen, wrote defendant calling their attention to certain
 unpaid bills, and said:

"We shall have to insist that either one of both of you
 take care of these matters immediately, and in the event that you
 fail to do so, we shall have to take legal action to bring
 necessary to effect the collection for the above bills."

"Finally advise us what disposition you intend to make of
 this matter."

Upon receipt of this letter, Mrs. Varlin went to the office
 of the attorney and talked with Mr. Lind, attorney of that office. She
 told him that when she was through paying the hospital bill she
 would start to pay the doctor. Lind agreed not to make further
 payments. He made no other claim then under this contract. Again
 November 21, 1935, after payment had been received by Lind, Mrs.
 Mrs. Varlin again went to the office of the attorney and talked with
 Lind. He said: "Why do you want this? The pay is all
 right now. Mr. Lindman already told us he wanted no other money ex-
 cept for us to pay the bill." Thereupon Lindman said: "You have not
 paid all the bills. You have paid Lindman's bill on the house
 and doctor bills. In the same evening, 21, and 22, Varlin went to
 the Lindman home, and Mr. Lindman said: "What are you looking for?
 The \$500 I want. Why do you want us to pay?" To which Lindman answered

You know I am not trying to get anything from you. I just want the bills paid. Every time you get a letter from the lawyer, come and see me. I know you have taxes and everything to pay on your house and whenever you have a few dollars come and bring it over." Mr. Clausen and Mr. Varrin shook hands, and as petitioners left Mr. Clausen said, "Don't worry. You do not have to go to court. Everything will be all right. I am going to see my lawyer."

March 12, 1936, petitioners received another letter from McBride. It called attention to payments theretofore made, said that approximately four months had elapsed since payment of \$100 had been made and they should like to be advised when they planned to make an additional payment on the doctor bill, and in what amount payment would be. Mrs. Varrin then called McBride by 'phone and told him they were paying the hospital bill in full first, because the hospital people told them that that bill had to be paid first; that she would pay the doctor and other bills as soon as she could. McBride at that time said nothing to her about the pending case. August 28, 1936, the Varrins made the last payment of \$50 to the doctor. Mrs. Varrin consulted with the doctor, and he told her the boy's condition was perfect, and that "you could not tell which leg was broken." Upon making the last payment, defendants received from Mr. Clausen a receipt which stated:

"The application of the above payment of fifty dollars (\$50) on said bill of Dr. O. T. Roberg, constitutes the final payment due thereon, and the undersigned releases the said Albert Varrin and Augusta Varrin from any further liability with respect to the said bill of Dr. O. T. Roberg. Said release shall not operate as a release or affect in any way the liability of the said Albert Varrin and Augusta Varrin for other expenses incurred as a result of said accident."

Appended to it is a statement of the same date to this effect:

"Dr. O. T. Roberg has discharged Henry Clausen and said Henry Clausen is no longer under his care."

The statement was signed by Harry C. Clausen.

You know I am not leaving to get anything from you. I don't want
the little thing. Every time you get a letter from the hospital, come
and see me. I know you have been and everything to get in your
house and whenever you have a few dollars come and bring it over.
Mr. Johnson and Mr. Smith speak to me, and we talk about it.
Mr. Johnson said, "Don't worry. You do not have to be afraid.
Everything will be all right. I am going to see you later."

March 22, 1936, testimony received from another letter from
Hedberg. It called attention to certain circumstances, and
that a certain lady from Seattle had received money from
had been made and they seemed like to be getting more money from
to make an additional payment on the doctor bill, and in that manner
payment would be. Mrs. Martin then called the lady by name and told
him they were paying the doctor bill in full time, because the doc-
tor bill people told them that they bill had to be paid first; that she
would pay the doctor and other bills as soon as she could. Hedberg
at that time said nothing to her about the money, and she said
1936, the Martin made the last payment of \$50 to the doctor. Hedberg
Martin contacted with the doctor, and he told her the doctor's condition
was perfect, and that they would not be in much longer. When
making the last payment, Hedberg had received from Mr. Johnson a cer-

ceipt which stated:

"The application of the boys payment of \$250.00
(1930) on note bill of Dr. J. J. Hedberg, transferred to the
payment due thereon, and the interest thereon, the sum of
Albert Martin and Mrs. Martin from the sum of \$250.00, which re-
sulted in the note bill of Dr. J. J. Hedberg, being re-
leased and all notes and interest on notes in and out of the
hands of the said Albert Martin and Mrs. Martin for the
expense incurred as a result of said payment."

Appended to it is a statement of the same date to the

effect:

"Mr. J. J. Hedberg has assigned to Henry Johnson and wife
Henry Johnson in full payment the sum of \$250.00."

The statement was signed by Henry C. Johnson.

February 5, 1937, the sheriff made a levy upon the home of the Varrins, and this was the first notice they had that any judgment had been entered against them. The petition goes on to state that petitioners have a good and meritorious defense to the action in that the son of petitioners was not negligent in the operation of the automobile as alleged in the complaint; that the plaintiff was guilty of contributory negligence; that Henry Clausen was riding a new bicycle at the time of the accident, was unable to stop same and peddled said bicycle into the rear of the automobile driven by the petitioner's son. They also aver that the damages in the sum of \$4,500 are grossly in excess of a reasonable amount which might be recovered by plaintiff inasmuch as plaintiff suffered no permanent injury.

It appears that in these transactions with the Clausens the defendants were not represented by attorneys. The Clausens were represented by attorneys who also acted for the minor plaintiff. It is argued at great length that the Clausens had no right to give a release of any right of action which existed in favor of their minor son. This may be true but that question is not involved here and is not determinative of the issue presented. The question to be decided on this record is whether the minor had a right to retain a judgment for \$4,500 taken by default and under circumstances disclosed in the amended petition, namely, that his father and guardian ad litem made a promise to the defendants (on which they relied) to the effect that it would be unnecessary for them to go to court. Under the facts as set up in the amended petition it would amount to fraud if plaintiff were allowed to retain this judgment. The order of the trial court setting it aside and granting the trial on the merits will therefore be affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

February 8, 1937, the plaintiff made a levy upon the bank of the Van Lins, and this was the first notice that the bank judgment had been entered against it. The plaintiff did not state that plaintiff had a good and valid claim against the bank in that the bank of plaintiff was not a party to the operation of the bank which was alleged in the complaint; that the plaintiff was a party of a partnership with the bank of plaintiff and was a partner at the time of the levy, and was liable to stop and add the bank to the list of the bank of the plaintiff by the plaintiff's bank. They also state that the bank in the year 1935 and 1936 and 1937 in respect of a certain bank which might be recovered by plaintiff through an assignment and that no permanent injury.

It appears that in these transactions with the plaintiff the defendants were not represented by attorneys. The plaintiff was represented by attorneys who also acted for the bank plaintiff. It is stated at that length that the plaintiff had no right to give a release of any right of action which existed in favor of their bank and that the only question which is not resolved here and is not representative of the bank plaintiff. The question to be decided on this record is whether the bank had a right to retain a judgment for \$2,500 taken by default and under circumstances disclosed in the amended petition, namely, that the bank and plaintiff had a right to the defendant (as with very little) to the effect that it would be unnecessary for them to go to court. Under the facts set up in the amended petition it seems to me that if plaintiff were allowed to retain this judgment. The question of the trial court setting it aside and granting the bank the right to set aside will therefore be affirmed.

39478

IN THE MATTER OF THE ESTATE OF
RICHARD T. CRANE, Jr., deceased.

IGNATIO BLONDA (petitioner),
Appellee,

v.

JOHN K. PRENTICE and CONTINENTAL
ILLINOIS NATIONAL BANK & TRUST COMPANY
OF CHICAGO, executors, (defendants),
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

292 I.A. 642¹

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

This cause was consolidated with case No. 39477, tried as one proceeding in the circuit court and argued orally on appeal. The facts and circumstances in this case are similar to cause No. 39477, except as to the name of the petitioner, the length of service and the amount awarded to him. What we said in our opinion this day filed in case No. 39477 is applicable to the circumstances of this case and controlling; therefore the judgment of the circuit court is affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

87493

IN THE MATTER OF THE ESTATE OF
MICHAEL J. DUNN, DECEASED.

LEGATIS ESTATE (will),
Petitioner,

v.

JULIE E. DUNN and CONSTANCE
DUNN, Respondents,
BY COUNSEL,
Respondents.

ses l.a. 0-13

THE COURT OF CHANCERY
COURT OF THE STATE OF NEW YORK

This cause was submitted with briefs, dated
as was proceeding in the circuit court and argued orally on
appeal. The facts and circumstances in this case are similar
to those in No. 87493, except as to the name of the petitioner,
the length of service and the amount awarded to her. She
was in her opinion then 65 years of age in 1947. It
appears to the court that the facts and circumstances
therefore the judgment of the circuit court is affirmed.
JAMES H. ALLEN, JR.

Constance and Julie, 13, 1947.

39479

IN THE MATTER OF THE ESTATE OF
RICHARD T. CRANE, deceased.

ALBERT BLONDA (petitioner),
Appellee,

v.

JOHN K. PRENTICE and CONTINENTAL
ILLINOIS NATIONAL BANK & TRUST
COMPANY OF CHICAGO, executors,
(defendants),
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

292 I.A. 642²

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

This cause was consolidated with case No. 39477, tried as one proceeding in the circuit court and argued orally on appeal. The facts and circumstances in this case are similar to cause No. 39477, except as to the name of the petitioner, the length of service and the amount awarded to him. What we said in our opinion this day filed in case No. 39477 is applicable to the circumstances of this case and controlling; therefore the judgment of the circuit court is affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

82422

IN THE MATTER OF THE ESTATE OF
ROBERT A. GALT, deceased.

ALBERT GALT (deceased),
Applicant.

JAMES E. KENNEDY and GEORGE W. KENNEDY,
LIENOR NATIONAL BANK & TRUST
COMPANY OF CHICAGO, INCORPORATED,
(defendants),
Applicants.

BEFORE THE COURT OF THE COUNTY OF
ILLINOIS, JUDGE OF THE COURT.

This cause was commenced with case No. 12345, filed
as one proceeding in the district court, and was removed to this
court by order of the court in this case and assigned
to case No. 12345, under the name of the plaintiff,
the length of review and the amount awarded to him. That
he had in his estate two 6% bonds in case No. 12345, which
applicable to the circumstances of this case and accordingly
therefore the judgment of the court is as follows:
JUDGMENT GRANTED.

JOHN E. KENNEDY, JR., Attorney.

39480

IN THE MATTER OF THE ESTATE OF
RICHARD T. CRANE, deceased.

ERNEST SONIER (petitioner),
Appellee,

v.

JOHN K. PRENTICE and CONTINENTAL
ILLINOIS NATIONAL BANK & TRUST
COMPANY OF CHICAGO, executors,
(defendants),

Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

292 I.A. 642³

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

This cause was consolidated with case No. 39477, tried as one proceeding in the circuit court and argued orally on appeal. The facts and circumstances in this case are similar to cause No. 39477, except as to the name of the petitioner, the length of service and the amount awarded to him. What we said in our opinion this day filed in case No. 39477 is applicable to the circumstances of this case and controlling; therefore the judgment of the circuit court is affirmed.

JUDGMENT AFFIRMED.

Seanlan and Sullivan, JJ., concur.

CHARGE

IN THE MATTER OF THE ESTATE OF
ALBERT T. CHASE, deceased.

JOHN A. HENNING and
JAMES H. HENNING, Executors,
vs.

JOHN A. HENNING and
JAMES H. HENNING, Executors,
vs.
ALBERT T. CHASE, deceased.
(Defendants)

ALBERT T. CHASE
DECEASED
JOHN A. HENNING

343 A. 643

ALBERT T. CHASE, deceased.
JAMES H. HENNING, executor.

This cause was commenced with case no. 1000, and
as the proceeding in the estate was a simple one
of administration, the facts and circumstances in this case are similar
to those in case no. 1000, except as to the name of the executor,
the length of service and the amount awarded to him. 1000
we held in our opinion that the facts in case no. 1000 are
applicable to the circumstances of this case and controlling,
therefore the judgment of the circuit court is affirmed.

THOMAS J. HENNING.

Henning and Henning, vs. Chase.

39481

IN THE MATTER OF THE ESTATE OF
RICHARD T. CRANE, deceased.

ROBERT K. LOW (petitioner),
Appellee,

v.

JOHN K. PRENTICE and CONTINENTAL
ILLINOIS NATIONAL BANK & TRUST COMPANY
OF CHICAGO, executors, (defendants),
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

292 I.A. 642⁴

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

This cause was consolidated with case No. 39477, tried as one proceeding in the circuit court and argued orally on appeal. The facts and circumstances in this case are similar to cause No. 39477, except as to the name of the petitioner, the length of service and the amount awarded to him. What we said in our opinion this day filed in case No. 39477 is applicable to the circumstances of this case and controlling; therefore the judgment of the circuit court is affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

13362

THE NEW YORK PUBLIC LIBRARY
ASTOR LENOX TILDEN FOUNDATION
500 5TH AVENUE NEW YORK 17, N.Y.

4 (continued); FBI NY 100-374100

47

JOHN K. WILSON, JR.
WILLIAM WILSON, JR.
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WILLIAM WILSON, JR.

THE UNIVERSITY OF CHICAGO

being, 1940, and some other substances are being left

of this case was accordingly forwarded to the Bureau of the Census for their consideration. It is suggested that the Bureau of the Census be kept advised of any further developments in this case.

Approved by the Board of Directors

39482

IN THE MATTER OF THE ESTATE OF
RICHARD T. GREEN, deceased.

G. LORING WOODBURY (petitioner),
Appellee,

v.

JOHN K. PRENTICE and CONTINENTAL
ILLINOIS NATIONAL BANK & TRUST
COMPANY OF CHICAGO, executors,
(defendants),
Appellants.

APPEAL FROM
CIRCUIT COURT,
COCK COUNTY.

292 I.A. 643

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

This cause was consolidated with case No. 39477, tried as one proceeding in the circuit court and argued orally on appeal. The facts and circumstances in this case are similar to cause No. 39477, except as to the name of the petitioner, the length of service and the amount awarded to him. What we said in our opinion this day filed in case No. 39477 is applicable to the circumstances of this case and controlling; therefore the judgment of the circuit court is affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

20402

IN THE MATTER OF THE ESTATE OF
ALFRED V. BROWN, deceased.

G. WILSON, Attorney (Plaintiff),
vs.
J. J. BROWN, Defendant.

JOHN A. BROWN and ALFRED V. BROWN
PLAINTIFFS
vs.
J. J. BROWN
DEFENDANT
(Defendants)

MR. JUSTICE, please advise the court
of the facts of the case.

This cause was commenced with case No. 2277, filed
as one proceeding in the circuit court and is now set for
appeal. The facts and circumstances in this case are as follows:
to cause No. 2277, namely as to the name of the plaintiff,
the length of service and the amount awarded to him. And
we said in our opinion on this day filed in case No. 2277 is
applicable to the circumstances of this case and accordingly;
therefore the judgment of the circuit court is affirmed.
JAMES H. BROWN.

WILSON and BROWN, Attorneys.

39501

CITY OF CHICAGO, a
municipal corporation,
Appellee,

v.

BOWMAN DAIRY COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

292 I.A. 643⁷

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

July 21, 1934, the City of Chicago brought a quasi-criminal action against Bowman Dairy Company, a corporation, defendant, to recover a penalty for violation of sec. 2656 of the municipal code. Plaintiff's statement of claim alleged that on to-wit: April 6, 1934, defendant maintained, owned and operated the premises at 6636 South Wentworth avenue, "in an unsafe manner by failing to remove boxes from adjoining building and keep boxes at least fifty feet from the building." Summons issued requiring defendant to appear in the municipal court August 8, 1934, to answer unto the city in its claim for "a penalty not exceeding \$200." Defendant failed to appear on the return day, and the court entered the following order:

"Now comes the plaintiff in this cause, the defendant being absent and not represented, and thereupon this cause comes on in regular course for trial before the Court without a jury, and the Court having heard the evidence and the arguments of counsel, and being fully advised in the premises, enters the following finding, to-wit:

"THE COURT FINDS THE DEFENDANT GUILTY OF A VIOLATION OF THE ORDINANCE DESCRIBED IN THE COMPLAINT HEREIN, AND ASSESSES A FINE AGAINST THE DEFENDANT IN THE SUM OF TWO HUNDRED DOLLARS (\$200.00)."

"This cause coming on for further proceedings herein, it is considered by the Court that the plaintiff have judgment on the finding herein, and it is considered by the Court that the plaintiff have

and recover of and from the defendant a fine in the sum of Two Hundred Dollars (\$200) in form as aforesaid assessed, and also the costs of this suit taxed at ten dollars (\$10) and that execution issue for the amount of said fine and costs. And it appearing to the Court that the said fine accrued to the plaintiff in consequence of the violation by defendant of the ordinance of the plaintiff described in the complaint herein known as sec. 2656, the court finds that it has jurisdiction of the subject matter of this cause and of the parties hereto, and that said defendant has been duly and regularly convicted of the violation of said ordinance according to law, and that any person convicted of a violation of said ordinance, may, under the law, be imprisoned in the House of Correction of said city for nonpayment of fine imposed for such violation.

"Fine Two Hundred and Costs for 122 days from April 6th to August 6th, 1934, for a total amount of \$25,600 Dollars. Twenty-five thousand six hundred dollars."

On the same day that the foregoing judgment order was entered two notations were made on the "half sheet" of the municipal court, as follows:

"Fined Two Hundred and costs for 122 days from April 6th to August 6th, 1934, for a total amount of \$25,600 dollars. Twenty-five thousand six hundred dollars."

"Leave given City to file amended complaint instanter."

The amended statement of claim filed by plaintiff on August 8, 1934, is as follows:

"Plaintiff's claim is for a penalty not exceeding \$200 for a violation by defendant of section 2656 of an ordinance of the City of Chicago in that the defendant did on, to-wit, April 6, 1934, and continuously up to and including August 6th, maintain, own and operate the premises at 6636 South Wentworth avenue, Chicago, in an unsafe manner by failing to remove boxes from adjoining building and keep boxes at least fifty feet from the building."

September 8, 1934, thirty-one days after the judgment order was entered, an execution was issued against defendant for \$200 and \$10 costs, and served on defendant September 11, 1934. The execution was returned "no part satisfied" on December 9, 1934, and subsequently, on October 7, 1936, defendant paid the judgment of \$200 and costs.

December 11, 1934, another execution was issued against defendant upon a judgment for \$25,600 and costs. This was returned "no part satisfied" March 12, 1935. Thereafter, garnishment proceedings were instituted by plaintiff on the \$25,600 judgment, which resulted in a dismissal of the garnishees by order of Judge Padden.

and recover of and from the defendant a fine in the sum of two hundred dollars (\$200) in form a warrant issued, and the costs of this writ taxed at ten dollars (\$10) and the execution issue to the sheriff of said county, and the return appearing to the Court that the said fine amount to the plaintiff in consequence of the violation by defendant of the ordinance of the plaintiff described in the complaint herein upon me, 1936, the Court finds that it is the jurisdiction of the Court in this cause and of the parties hereto, and that this defendant has failed to comply with the said ordinance of said ordinance relating to law, and that any person convicted of a violation of said ordinance, may, upon the facts as shown in the House of Correction of said city for a period of time not less than six months, and not more than one year, be confined for such violation.

"The two brothers and sister of the deceased were all to
bequeath to the deceased for a total amount of \$2,000 Dollars. Twenty-
five thousand six hundred dollars."

On the same day that the Rosenberg Judgment order was entered, no notations were made on the "half sheet" of the original copy, as follows:

"Fines Two Hundred and cost for 100 days from April 6th to August 6th, 1902, for a total amount of \$2,000.00. Twenty-five thousand in hundred dollars.

"I have lived with this mind condition in 1947."

It was no intention of being able to transmit the same

2, 1951, in the following:

[illegible]

December 11, 1954, another execution was found which was returned "no part retained" on Dec 11, 1954, and returned to Costa, and served on defendant September 11, 1954. The execution was entered, an execution was issued against defendant for \$500 and September 2, 1954, thirty-one days after the judgment order

seedlings were marked by a number on the top of the seedling, which "no part of the seedling" (March 12, 1933). The seedlings, however, were determined upon a judgment of the seedling and color. This was determined by

November 25, 1936. An appeal followed and Judge Padden's order was affirmed by this court in case No. 39456 (not published).

December 2, 1936, the city filed a petition sworn to by Edward Pinger, alleging in substance that he was employed by the city as a fire prevention engineer; that he was present in the municipal court August 8, 1934, when this case was called for trial; that an ex parte hearing was had on the city's amended complaint for violation of sec. 6656 of the municipal code, and pursuant to a finding of guilty a fine of \$200 was imposed for each day the violation occurred, being 122 days from April 6 to August 6, 1934, aggregating \$24,400; that in order to make the records show the true facts the petition prayed that an order be entered requiring the clerk of the municipal court to correct the judgment, nunc pro tunc as of August 8, 1934. It appears that after some argument the City of Chicago withdrew this petition and then proceeded to set forth the facts alleged therein by the oral testimony of Pinger, to which defendant objected. Pinger's testimony is substantially the same as the allegations of his petition. Upon conclusion of the hearing Judge Holland entered an order reciting that the motion of the city to correct the record was supported by the sworn petition of Edward Pinger, and concluded as follows:

"Trial by court ex parte; finding defendant guilty of violation of ordinance described in amended complaint and fined \$200 for 122 days from April 6 to August 6, A. D. 1934, for a total amount of \$24,400 and costs assessed at \$10 for violation of city ordinance described in complaint, Section 2656 of the Revised Chicago Code of 1931. Judgment on the finding."

Defendant has appealed from the latter order, and the question presented is whether it constitutes a valid judgment. This question was really passed upon in the former appeal, cause No. 39456, wherein it was held by another division of this court, among other things, that "these changes having been made long after the court had lost jurisdiction, such action had no legal basis and was not in harmony with

[illegible]

correct legal procedure." This appeal was pending when the opinion in the former case was filed.

We are likewise of the opinion that the amended judgment order was invalid. Nothing appears therein tending to show that the judgment order of August 8, 1934, was vacated or set aside, and therefore there are of record in this case two judgments, - one for \$200, enter August 8, 1934, and one for \$24,400, enter December 4, 1936, predicated upon the same offense. The former judgment was paid. The order entered August 8, 1934, clearly indicates that judgment was entered for \$200, and \$10 costs, and for no other amount. During the trial of the garnishment proceedings before Judge Edden, it was admitted by plaintiff that the notation of the fine of \$200 for 122 days included the \$200 and costs in the first judgment. Thus defendant has been twice fined for the same violation. The law is well settled that where a judgment has been entered in a cause, no subsequent valid judgment may be entered therein until the first has been vacated and set aside. (Tosetti v. Brewing Co. v. Wagner, 168 Ill. App. 27; 33 Corpus Juris, sec. 123, p. 1193.) The confused state of the record seems to have been recognized by the city, when it made its motion December 4, 1936, "to correct the record;" otherwise there would have been no reason for correcting the record.

The city contends that the order correcting the erroneous entry of the judgment of August 8, 1934, was based upon memoranda in possession of the trial court at the time the order was entered. Upon hearing on the petition to correct the record, the court stated that it was acting upon a memorandum purporting to be "part of the whole memorandum of many cases heard by the court in room 1128." When counsel for defendant insisted that the court disclose what the memorandum contained, it was not produced, and it is argued by defendant that the court depended upon its memory rather than upon any

contact, legal procedure. This report was prepared under the

control in the future and the future.

we are interested in the question of the future of the

order and finally, the future of the future in the future

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notation made at the time of the hearing, which would justify a correction of the judgment order. In fact, the order of December 4, 1936, correcting the record, recites that it is entered upon the sworn petition of Pinger, who stated that he was present in court August 8, 1934, rather than upon any independent recollection of the court or memorandum preserved upon the hearing.

From what we have said, it would serve no useful purpose to remand the cause, and therefore the judgment of the municipal court is reversed.

JUDGMENT REVERSED.

Scanlan and Sullivan, JJ., concur.

39707

ANN JONES ARBUCKLE,
Appellant,

v.

HARRY JONES,
Appellee.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

292 I.A. 64³

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

Ann Jones filed a bill for divorce in the circuit court against Harry Jones which resulted in a final decree, entered March 30, 1932, awarding custody of the minor child, Robert, to Mrs. Jones, allowing the father to visit the child every Sunday forenoon from nine to twelve o'clock, and requiring Mr. Jones to pay \$50 each month as and for the support of the child. Subsequently Mrs. Jones married Grover S. Arbuckle and Mr. Jones also remarried.

Defendant complied with the terms of the decree until September, 1932, when he reduced the support money to \$30, representing that he had received a series of reductions in his salary which in the aggregate amounted to approximately one-third. Plaintiff accepted the reduced amount until December 15, 1935, when defendant discontinued altogether to make payments because he was not permitted the right of visitation as provided by the decree. Shortly thereafter he filed a petition in the circuit court seeking to enforce his right of visitation. Plaintiff answered the petition and filed a counter-petition praying for \$1,627 alleged to be due for arrearages in support money under the original decree. On hearing counsel for the respective parties stipulated that the amount in arrears aggregated

20702

AND JAMES L. JONES, Plaintiff,

v.

HARRY JONES, Appellee.

MR. JUSTICE JONES, JUDGE.
DETERMINED THE QUESTION OF THE COURT.

Ann Jones filed a bill for divorce in the circuit court against Harry Jones which resulted in a final decree, entered March 30, 1932, awarding custody of the minor child, Robert, to Mrs. Jones, allowing the father to visit the child every Sunday forenoon from nine to twelve o'clock, and requiring Mr. Jones to pay \$50 each month as and for the support of the child. Subsequently Mrs. Jones married George E. Roberts and Mr. Jones has remarried.

Defendant complied with the terms of the decree until September, 1932, when he refused the support money to \$20, representing that he had received a series of reductions in his salary in the aggregate amounting to approximately \$100.00. Plaintiff accepted the reduced amount until December 15, 1932, when defendant discontinued altogether to make payments because he was not permitted the right of visitation as provided by the decree. Plaintiff thereupon filed a petition in the circuit court seeking to enforce his right of visitation. Plaintiff answered the petition and filed a counter-petition praying for \$1,000.00 damages to be paid for support money under the original decree. An hearing was held for respective parties and it was determined that the amount in dispute was \$1,000.00.

\$1,200. The court found inter alia that defendant "owes the cross-petitioner, Ann Jones, naught as of February 27, 1937, on account of the provisions of the decree of divorce providing for child support, for the reason that the cross-petitioner, Ann Jones, has heretofore on, to-wit, December 15, 1935, and continuously thereafter until to-wit, February 9, 1936, violated the order of this court in failing to permit petitioner, Harry Jones, to see his minor son, Robert, on Sundays as provided in said decree;" also that defendant, Harry Jones, "is earning sufficient income to comply with the terms of the decree as originally entered herein for the support of his minor son, Robert;" that he pay to plaintiff the sum of \$118.30 to reimburse her for 50% of the moneys advanced and paid out by her for medical attention procured for Robert prior to February 27, 1933; that defendant pay one-half of all doctor's charges and medical expenses incurred for the child in the future; and that defendant be permitted to have the custody of his son each and every Saturday and Sunday from noon to 6:00 p.m. Plaintiff appeals from that part of the order finding that Jones owes her "naught on account of the provisions of the decree."

Plaintiff was employed as a salesman for the American Steel & Wire Company. When the decree was entered in 1932 he was earning \$270 a month. His duties as a salesman were confined to the northern half of Illinois and he covered the territory assigned to him by automobile, the upkeep of which he paid from his salary. He continued to pay \$50 each month until September, 1932, when his salary was reduced to \$229.50 a month in consequence of the business depression, and in addition to his Illinois territory he was required to cover the State of Indiana, without a corresponding increase in his expense account. This extra burden, according to the uncontroverted evidence, cut into his salary so that his net income was approximately \$130 a month, and he was no longer able to comply with the payments required by the

The court found that the defendant owed the cross-petitioner, Mrs. Jones, a sum of \$1,100, on account of the provisions of the decree of divorce provided for the reason that the cross-petitioner, Mrs. Jones, had furnished on, to-wit, December 15, 1906, and continuously thereafter until January 9, 1906, violating the order of the court in failing to permit petitioner, Harry Jones, to see his minor son, Robert, as provided in said decree; also that defendant, Mrs. Jones, "is earning sufficient income to comply with the terms of the decree as originally entered herein for the support of his minor son, Robert; that he pay to plaintiff the sum of \$11.00 to reimburse her for the moneys advanced and paid out by her for medical attention rendered for Robert prior to February 27, 1906; and defendant pay one-half of all doctor's charges and medical expenses incurred for the child in the future; and that defendant be permitted to have the custody of his son each and every Saturday and Sunday from noon to 6:00 p.m. Plaintiff appeals from that part of the order finding that Jones owes her "amount on account of the provisions of the decree." Plaintiff was employed as a salesman for the Western Union & Wire Company. When the decree was entered in 1906 he was earning \$270 a month. His duties as a salesman were confined to the northern half of Illinois and he covered the territory assigned to him by automobile, the amount of which he paid from his salary. The defendant paid \$50 each month until September, 1906, when his salary was reduced to \$250.00 a month in consequence of the business depression, and in addition to his Illinois territory he was required to cover the state of Indiana, without a corresponding increase in his expense account. This extra burden, according to the usual business estimate, cost him his salary so that his net income was approximately \$200 a month, and he was no longer able to comply with the payments required by the

decree. He so advised plaintiff, who thereafter and until December 15, 1935, accepted \$30 each month. During this period defendant visited his son regularly. In December, 1935, plaintiff refused him the further right of visitation, and he thereupon discontinued payments altogether. After numerous calls at the Arbuckle home and persistent refusal of plaintiff to allow him to see his son, defendant tried to arrange a meeting with the Arbuckles through Mr. Lynn, their attorney, but plaintiff refused to meet him, saying that she "did not wish to waste any time on an appointment with Mr. Jones," and that "we are not interested other than he pay up what is due us, or we much prefer adopting Bobby legally."

It was argued before the chancellor that Jones's representations as to his earnings were false and upon discovery of the fraud plaintiff was entitled to the difference between the \$50 payments required by the decree and the sum of \$30 actually paid her from September, 1932, to December, 1935. An examination of the record, however, does not sustain this contention. The period in question was one of financial depression, and Jones testified that in order to retain his position he was required to take a reduction in salary and also cover additional territory, which so depleted his net earnings as to make it impossible for him to pay \$50 a month and still maintain himself. We are of the opinion that the evidence amply supports this contention.

The chancellor predicated his finding that there was nothing due plaintiff under the provisions of the decree upon her violation of the decree in refusing to permit defendant the right of visitation, and defendant's counsel seek to justify the order without citation of any authorities. The contention made by defendant does not constitute a legal defense, however, for all the cases that have been cited by plaintiff's counsel (and there are none to the contrary in defendant's brief) hold that the refusal of plaintiff to allow defendant to see his child as provided in the decree does not relieve him of the obligation

of supporting the child. This rule of law is predicated upon the theory that the rights and interests of the child are always of paramount consideration. If Mrs. Arbuckle violated the decree by refusing Jones the right of visitation it was his privilege to apply to the court which always had jurisdiction of the subject matter, for a rule on plaintiff requiring her to carry out the decree and permit him to visit his child. However, he failed to do this and instead cut off the support money altogether, and this he could not legally do, under the well established rule laid down in Lancaster v. Lancaster, 29 Ill. App. 510; Thomas v. Thomas, 233 Ill. App. 488; Kane v. Kane, 241 Mich. 96, 216 N. W. 437.

Plaintiff's counsel also argue that the decree of divorce entered March 30, 1932, was a final judgment of the court and payments for the support of the minor child accruing thereunder became a vested property right of which the child was the sole beneficiary. This rule is supported by various decisions in this state (Craig v. Craig, 163 Ill. 183; Gordon v. Baker, 182 Ill. App. 587; Dinet v. Eigenmann, 80 Ill. 279; and Stillman v. Stillman, 99 Ill. 204.) There is abundant evidence to sustain the contention that plaintiff voluntarily agreed to accept the lesser amount, but aside from that fact Jones's circumstances would have made it impossible for him during the period of depression to pay the full \$50. Under all the circumstances disclosed by the record we are of the opinion that the contention made is not applicable to the facts herein.

The parties made an oral stipulation that the total arrearages amounted to \$1,200. The record does not disclose how they arrived at this figure. In our view of the situation there would have been nothing due plaintiff up to December 15, 1935, when Jones made his last payment of \$30. However, when he ceased making payments altogether Mrs. Arbuckle was justified in considering her agreement to accept

of supporting the wife. This wife of law is questioned upon the theory that the wife and husband of the wife are always of equal weight consideration. It is, however, a question of law, for the law is not the right of the wife to support the husband, but the right of the husband to support the wife. The court which has jurisdiction of the subject matter, for a wife on plaintiff's petition has to carry out the burden and prove him to visit his wife. However, he is not to be visited by the wife out of the support money. Therefore, and this he could not legally do, under the will established wife I is down in Thompson v. Thompson, 23 Ill. App. 310; Thompson v. Thompson, 232 Ill. 404; Thompson v. Thompson, 241 Mich. 98, 218 N. W. 187.

Thompson's counsel also states that the decree of divorce entered March 28, 1932, was a final judgment of the court and payment for the support of the minor child according to the decree was a vested right of which the wife was the sole beneficiary. This wife is supported by various decisions in this state (Thompson v. Thompson, 232 Ill. 404; Gordon v. Gordon, 122 Ill. 404; Thompson v. Thompson, 232 Ill. 404; Thompson v. Thompson, 232 Ill. 404). There is no support of the wife to sustain the contention that Thompson's voluntary agreement to support the lesser amount, but wife takes that Thompson's statement one would have made it impossible for him during the period of divorce to pay the \$250. Under all the circumstances disclosed by the facts we are of the opinion that the wife is not entitled to the \$250. Thompson v. Thompson.

The parties made an oral agreement that the wife should be awarded \$1,200. The record does not show that they entered an oral agreement. In our view of the situation there would have been no due of anything up to December 15, 1932, when Thompson made his last payment of \$50. However, when he agreed to pay \$250 per month, Mrs. Thompson was justified in considering him obligated to support

the lesser amount terminated, and thereafter she was entitled to insist on \$50 a month as specified in the decree. The chancellor found that Mr. Jones now has a sufficient income to comply with the decree as originally entered, and therefore the amount due plaintiff should have been calculated on the basis of \$50 a month from December 15, 1935, to the time of the hearing. For this period of fourteen months, at \$50 a month, the order should have been for \$700. Since the order of the chancellor provides for the right of Mr. Jones to visit his son on Saturdays and Sundays, that part of the order is affirmed, but that part of the order finding that Jones owes plaintiff nothing on account of the provisions of the decree, is reversed and the cause remanded with directions to amend the order to find that defendant owes plaintiff \$700.

ORDER AFFIRMED IN PART, REVERSED IN
PART AND REMANDED WITH DIRECTIONS.

Scanlan and Sullivan, JJ., concur.

39757

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error;

v.

MARY MILLER,
Plaintiff in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

292 I.A. 643⁴

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

Mary Miller, defendant, sued out a writ of error to reverse the finding and judgment of the municipal court after a trial before the court without a jury upon an information charging her with larceny of property in the following language:

"Mary Miller, late of the City of Chicago, heretofore to-wit: on the 21st day of June, A. D. 1937, at the City of Chicago, in said County of Cook, in the State of Illinois aforesaid, did then and there unlawfully steal, take, and carry away from the said Bert Badgley United States Currency, to-wit: of the value of Two (\$2.00) Dollars, the personal goods and property of Bert Badgley, then and there being found, did then and there wrongfully and unlawfully take, steal and carry away, contrary to the Statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois."

Defendant pleaded not guilty. The cause was heard by the court July 14, 1937, and there was a finding that defendant was guilty of larceny, of the value of \$2, and she was thereupon sentenced to six months imprisonment in the House of Correction, and fined \$50.

It is first urged as ground for reversal that currency is not money and therefore cannot be the subject of larceny. This precise question was considered in People v. Greenberg, 222 Ill. App. 243, wherein the defendant was tried upon an information charging him with stealing \$2 in United States currency, and other articles.

30727

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

MARY MILLER,
Plaintiff in Error.

202 I.A. 643

MR. JUSTICE TUNNEY
DELIVERED THE OPINION OF THE COURT.

Mary Miller, defendant, sued out a writ of error to reverse the finding and judgment of the municipal court after a trial before the court without a jury upon an information charging her with larceny of property in the following language:

"Mary Miller, late of the City of Chicago, hereafter to be called 'the State of Illinois,' at the City of Chicago, in said County of Cook, in the State of Illinois, did then and there unlawfully steal, take, and carry away from the said Mary Miller United States currency, to-wit: of the value of two (\$2.00) Dollars, the national good and property of the State of Illinois, then and there being found, did then and there wrongfully and unlawfully take, steal and carry away, contrary to the Statute in such cases made and provided, and against the peace and dignity of the State of Illinois."

Defendant pleaded not guilty. The case was heard by the court July 14, 1937, and there was a finding that defendant was guilty of larceny, of the value of \$2, and she was thereupon sentenced to six months imprisonment in the House of Correction, and fined \$20.

It is first urged as ground for reversal that currency is not money and therefore cannot be the subject of larceny. This question was considered in People v. Grayson, 228 Ill. App. 243, wherein the defendant was tried upon an information charging him with stealing \$2 in United States currency, and other articles.

The contention was made in that case, as it is here, that the currency was not specifically described and that it did not constitute money, but we held, upon the authority of Marine Bank of Chicago v. Rushmore, 28 Ill. 463, that the word "currency" is understood to mean "bank bills or other paper money issued by authority, which pass as and for coin," and that the information sufficiently described the denomination of the currency alleged to have been stolen. Bouvier's Law Dictionary, p. 740, defines currency as "a term commonly used for whatever passes among the people for money, whether gold or silver coin or bank notes," and in Words & Phrases, the term "money" is defined as synonymous with "currency," and imports any currency, token, bank notes or other circulating medium in general use as the representative of value. Moreover, the larceny statute (chap. 38, par. 387, sec. 167, Illinois Rev. Statutes, 1937) provides that "larceny shall embrace every theft which deprives another of his money or other personal property *** and may also be committed by feloniously taking and carrying away any bond, bill, note, receipt or any instrument of writing of value to the owner." We think that the larceny of currency comes within the purview of this statute.

As the remaining ground for reversal plaintiff in error contends that the information is so substantially defective that the court did not acquire jurisdiction of the subject matter of the person tried. No motion was made to quash the information nor were there any motions for a bill of particulars or in arrest of judgment. Sec. 9 of Division XI of the Criminal Code (Illinois Revised Statutes 1937, chap. 38) provides that all exceptions directed merely to the form of the indictment or information shall be made before trial, and that no motion in arrest of judgment or writ of error shall be sustained for any matter not affecting the real merits of the offense charged.

The contention was made in that case, as it is here, that the currency was not specifically described and that it was an estimate only, but we held, upon the authority of United States v. Chicago & North Western Ry. Co., 111 U.S. 376, that the word "currency" is understood to mean "bank bills or other paper money issued by authority, which bears as such for value," and that the information sufficiently described the denomination of the currency alleged to have been stolen. Rowland's Law Dictionary, 2d Ed., defines currency as "a term commonly used for whatever passes among the people for money, whether gold or silver coin or bank notes," and in Thames, the term "money" is defined as "synonymous with 'currency'." and imports any currency, token, bank notes or other circulating medium in general use as the representative of value. However, the larceny statute (chap. 38, par. 205, sec. 125, Illinois Rev. Statutes, 1925) provides that "larceny shall embrace every theft which deprives another of his money or other personal property and may also be committed by feloniously taking and carrying away any bond, bill, note, receipt or any instrument of writing of value to the owner." We think that the larceny of currency comes within the purview of this statute.

As the remaining ground for reversal is insufficient in order to tenders that the information is so substantially defective that the court did not acquire jurisdiction of the subject matter of the person tried. No motion was made to quash the information nor were there any motions for a bill of particulars or in arrest of judgment. Sec. 9 of Article XI of the Criminal Code (Illinois Revised Statutes 1925, chap. 38) provides that all indictments directed merely to the form of the indictment or information shall be made before trial, and that no motion in arrest of judgment or writ of error shall be considered for any matter not affecting the legal merits of the offense charged.

Inasmuch as petit larceny is a statutory offense, defined in the criminal code and punishable thereunder, the indictment or information upon which the trial is based must be construed in accordance with the code and is sufficient if it states the offense in terms and language of the code so that the nature of the offense charged may be readily understood. The information in this proceeding charges the defendant with stealing United States currency of the value of two dollars. Neither defendant, the court nor the jury would have any difficulty in understanding the nature of the offense charged, and it has been repeatedly held that an information which states the offense so plainly that it may readily be understood by the defendant, so as to enable him to properly prepare his defense, is sufficient. (People v. Donaldson, 341 Ill. 369.) In People v. Cohen, 303 Ill. 523, defendant was tried on an information charging petit larceny of "One (\$1.00) Dollar, good and legal money of the United States of America." The contention was there made that the information did not sufficiently describe the property stolen, but the court said (p. 525) that "great niceties and strictness of pleading should only be countenanced and supported when it is apparent that the defendant may be surprised on the trial, or unable to meet the charge or make preparations for his defense for want of greater certainty or particularity."

We find no reversible error. The judgment of the municipal court is therefore affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

39761

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

v.

ROSE RISTICK, alias ROSIE MITCHELL,
Plaintiff in Error.

54A
ERROR TO MUNICIPAL
COURT OF CHICAGO.

292 I.A. 644¹

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

This writ of error sued out by Rose Ristick, alias Rosie Mitchell, to review the finding and judgment of the municipal court, is similar in every respect to case No. 39757, People v. Miller, except as to the identity of the defendant. The causes were not consolidated, but plaintiffs in error in both cases were represented by the same counsel and identical briefs, raising the same questions and citing the same authorities, were filed in the two proceedings. What we said in case No. 39757 is precisely applicable to this cause, and for the reasons stated in that opinion, which need not here be repeated, the judgment of the municipal court of Chicago rendered in this cause is affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

2075

PROVINCE OF THE STATE OF
ILLINOIS

Belonging in error

v.

JOHN HENRY, alias JOHN HENRY,
Defendant in error.

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff in error.

2075 I.A. 644

This writ of error was granted by the Supreme Court, after the
petitioner, to review the finding and judgment of the Appellate Court,
in the case of the People v. John Henry, No. 2075, in which the
Appellate Court, in its opinion, stated that the evidence was
sufficient to establish the guilt of the defendant, and that the
verdict was proper. The Supreme Court, in its opinion, stated
that the evidence was not sufficient to establish the guilt of the
defendant, and that the verdict was improper. The Supreme Court
therefore reversed the judgment of the Appellate Court, and
granted a new trial. The Appellate Court, in its opinion, stated
that the evidence was sufficient to establish the guilt of the
defendant, and that the verdict was proper. The Supreme Court,
in its opinion, stated that the evidence was not sufficient to
establish the guilt of the defendant, and that the verdict was
improper. The Supreme Court therefore reversed the judgment of
the Appellate Court, and granted a new trial.

JOHN HENRY

JOHN HENRY and WILLIAM J. HENRY

39458

PEOPLE OF THE STATE OF ILLINOIS
ex rel. PHILIP McGUIRE et al.,
Appellants,

v.

CITY OF CHICAGO, a Municipal
Corporation, et al.,
Appellees.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

292 I.A. 644²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This appeal was consolidated for hearing with the appeal in People of the State of Illinois, ex rel. Michael J. Mulvey et al. v. City of Chicago, a Municipal Corporation, et al., Gen. No. 39464, in which case we have on this date filed an opinion wherein we have also set forth our reasons and conclusions touching the matters involved in the instant appeal, and for the said reasons and conclusions stated in that opinion the judgment order of the Superior court of Cook county entered in the instant suit, People of the State of Illinois, ex rel. Philip McGuire et al. v. City of Chicago, a Municipal Corporation, et al., on January 29, 1937, is affirmed.

JUDGMENT ORDER ENTERED
JANUARY 29, 1937, AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

00100

RECORD OF THE STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE JUDICIAL DISTRICT OF THE
SOUTHERN DISTRICT OF ILLINOIS

v.

CITY OF CHICAGO, Plaintiff,
vs.
JAMES W. HARRIS, Defendant.

FILED FOR RECORD
JANUARY 10, 1907

1907. A. 644

THE JUDICIAL DISTRICT OF THE SOUTHERN DISTRICT OF ILLINOIS

THIS appeal was submitted for review with the appeal

in People of the State of Illinois, et al. against James W. Harris

et al. v. City of Chicago, a Circuit Court Cause No. 10000.

Case No. 10000, in which case we have on this date filed an

opinion wherein we have also set forth our reasons and conclusions

concerning the matters involved in the instant appeal, and the fact

also become our conclusion reached in that opinion the judgment

order of the superior court of Cook County entered in the instant

case, People of the State of Illinois, et al. against James W. Harris

et al. v. City of Chicago, a Circuit Court Cause No. 10000, as amended.

1907, is affirmed.

THOMAS J. HARRIS, Clerk
JANUARY 10, 1907, CHICAGO.

Witness my hand and seal this 10th day of January, 1907.

39664

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

GEORGE DOWNS,
Plaintiff in Error.

ERROR TO MUNICIPAL
COURT OF CHICAGO.

292 I.A. 644³

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

On November 9, 1935, George Downs was present in branch 27 of the Municipal court of Chicago and moved the court to vacate an ex parte judgment theretofore rendered against him in a cause entitled City of Chicago v. George Downs. While Downs and the attorneys for the parties were before the bar of the court and the court was hearing said motion, a newspaper photographer attempted to take photographs of the "court proceedings" and Downs said "I don't want any cheap publicity." Solely because of this statement judgment was entered finding Downs guilty of direct contempt of court and sentencing him to the county jail for a term of ten days. The contemnor prosecutes this writ of error to reverse the judgment.

Downs contends that the facts set out in the order adjudging him guilty of contempt of court do not constitute contempt of court. Where the judgment and commitment are for direct contempt as they are here, the only record required to be made is the contempt order of the trial court. That order should set out the facts constituting the offense so fully and certainly as to show that the court was authorized to enter the order, and the facts stated must be taken to be true. The purpose of requiring these facts to be shown in the record is to enable reviewing courts to see whether or not they

38801

PROVINCE OF THE STATE OF ILLINOIS,
Defendant in error.

v.

GEORGE DOWNS,
Plaintiff in error.

IN SENATE

COURT OF COMMONS

MR. JUSTICE GUTHRIE DELIVERED THE OPINION OF THE COURT.

On November 3, 1903, George Downs was present in person
at the Municipal Court of Chicago and moved the court to vacate
an ex parte judgment theretofore rendered against him in a case
entitled City of Chicago v. George Downs. While Downs and the
attorneys for the parties were before the bar of the court and
the court was hearing said motion, a newspaper photographer attempted
to take photographs of the "court proceedings" and Downs said "I
don't want any cheap publicity," solely because of this statement
judgment was entered finding Downs guilty of direct contempt of
court and sentencing him to the county jail for a term of ten days.
The contemnor procured this writ of error to reverse the judgment.
Downs contends that the facts set out in the order adjudging
him guilty of contempt of court do not constitute contempt of court,
where the judgment and commitment are the direct result of a
and here, the only record required to be made is the summary record
of the trial court. That error is shown by the facts and findings
the offense to fully and certainly as to show that the court was
authorized to enter the order, and the facts setting out the same to
be true. The purpose of requiring these facts to be shown in the
record is to enable reviewing courts to see whether or not they

amount to contempt and thus to determine from them the jurisdiction of the trial court. (People v. Saylor, 238 Ill. App. 144.) The judgment order in the instant case, including the findings of the court is as follows:

"Defendant present in open Court, finding defendant guilty of contempt of Court because this day in Branch Court No. 27-1121 So. State St., Chicago, Illinois, while the Court was in open session and in a trial case #3537511 which was then pending motion to vacate Ex Parte Finding City of Chicago vs George Downs, a case then pending and undetermined, said defendant used abusive and improper language before the Court in that said defendant when a newspaper photographer attempted to take photographs of the court proceedings did say, I don't want any cheap publicity, all of which conduct of said defendant then and there tended to impede and interrupt the proceedings and lessen the dignity of the court. Judgment on finding defendant [guilty] of contempt of Court, defendant sentenced to the County Jail for the term of ten days."

Before one can be found guilty of direct contempt of court and punishment inflicted upon him, it must clearly appear that he was actuated by a malevolent intention or a contemptuous disposition to affront the authority and dignity of the court or to knowingly or willfully interfere with the administration of justice. It will be noted that the order contains no finding of fact that the attitude of the contemnor was disrespectful to the court or that his conduct was boisterous or undecorous. The only finding of fact in the judgment order is that "when a newspaper photographer attempted to take photographs of the court proceedings," the contemnor said "I don't want any cheap publicity." It was from this statement alone, made under the circumstances indicated in the order, that the court concluded that the contemnor's language was "abusive and improper" and that his conduct "then and there tended to impede and interrupt the proceedings and lessen the dignity of the court." We fail to perceive how Downs's statement could be construed either as abusive or contemptuous. It was the photographer rather than Downs who not only attempted to but did interrupt the proceedings before the court. The contemnor was a party to the proceedings then on hearing before the

court and not only did the photographer have no right to take Downs's picture while court was in session but the court had no right to permit him to do so. When the court refused to afford Downs the protection to which he was entitled, he was justified in protecting himself as best he could. He had a right to protest against having his picture taken before the bar of the court for publication in newspapers to the embarrassment of himself and the humiliation of his family. The declaration made by him by way of protest was in no wise contemptuous and furnished no ground for the entry of the judgment finding him in contempt of court and imposing the jail sentence upon him.

The trend of sound thought on the part of the bench, bar and laity upon the subject of taking photographs in and about the court rooms is clearly expressed in the following rule of ^{the} circuit and superior courts of Cook county:

"No photograph shall be taken in any court-room over which this Court has control, or so close to such court-room as to disturb the order and decorum thereof, while the Court is in session or at any other time when there are present court officials, parties, counsel, jurymen, witnesses or others connected with proceedings pending therein."

Our supreme court condemns the practice of trial judges allowing representatives of newspapers to take photographs during the progress of trials in the case of The People v. Munday, 280 Ill. 32. In that case the court used the following language at pp. 67 and 68:

"Complaint is made of the action of the court in permitting representatives of various newspapers claimed to be hostile to plaintiff in error to take photographs of the jury, the defendant and the court, and in suspending the progress of the trial at different times to permit these photographs and moving pictures to be taken. It does not appear that any objection was interposed on behalf of plaintiff in error to the taking of the photographs and moving pictures. On the contrary, it does appear from the record that it was expressly consented to. Whether or not the parties consented to the taking of the photographs, and without regard to whether such acts were prejudicial, the court should not have permitted it. It is not in keeping with the dignity a court should maintain, or with the proper and orderly conduct of its business, to permit its sessions to be interrupted and suspended for such a purpose. ***

"The trial of a case should consist only of the sober investigation of the matters in issue. It is not to be regarded as

court and not only did the photographer have no right to take
Downs's picture while court was in session but the court had no
right to permit him to do so. When the court refused to allow
Downs the protection to which he was entitled, he was justified in
protecting himself as best he could. He had a right to protect
himself by taking his picture taken before the start of the trial
publication in newspapers to the detriment of the public and the
humiliation of his family. The court's action was in violation of
protest was in no way constituted and furnished no ground for the
entry of the judgment finding him in contempt of court and imposing
the jail sentence upon him.

The trend of court proceedings on the part of the bench, and
and later upon the subject of taking photographs in and about the
court rooms is clearly apparent in the following rules of the
and superior courts of New Jersey:

"The photograph shall be taken in any court-room over which
this court has control, or in any court-room to which
the order and decorum of the court is in danger or in
any other place where the presence of the public, the
counsel, laymen, witnesses or others connected with proceedings
pending therein."

Our supreme court contains the provision of taking pictures
ing representatives of newspapers to take photographs in and
areas of trials in the case of the People v. [Name], 100 N. J.
that case the court used the following language at pp. 17 and 18:

"Complaint is made of the action of the court in permitting
representatives of various newspapers to be admitted to
of itself in order to take photographs of the trial, the witnesses
and the court, and in permitting the presence of the public
different times to permit these photographs and thereby to
be taken. It has not been shown that the admission of the public
detail of the trial in order to take photographs of the trial
moving pictures. In the case of the People v. [Name], the court
that it was especially concerned to protect the dignity of the
extended to the public of the courtroom, and it has been
in these cases were prejudicial, the facts showing and have
mitted it. It is not in dispute that the taking of pictures
maintain, or in the proper and orderly conduct of the trial
to permit the admission of the public to take photographs of the
purpose."

an entertainment or in any sense as a festive occasion. The court should not permit the conversion of the court room into a picture gallery or the trial of a case into a show."

The contemnor was clearly within his rights in protesting against the newspaper photographer taking his picture, especially against his will and without his consent. The judgment of the municipal court is reversed.

JUDGMENT REVERSED.

Friend, P. J., and Scanlan, J., concur.

an endorsement of its policy and its position. The court should not permit the conversion of the court into a political party or the trial of a case in a political party.

The conversion was the only thing that was in the mind of the court. The court should not permit the conversion of the court into a political party or the trial of a case in a political party. The court should not permit the conversion of the court into a political party or the trial of a case in a political party.

THE COURT IS NOT A PARTY.

THE COURT IS NOT A PARTY.

39740

MARION LESZCZYNSKI,
Appellee,

v.

MARY TWAROWSKI,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

292 I.A. 644⁴

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action of forcible detainer brought by plaintiff, Marion Leszczynski, against defendant, Mary Twarcowski, to secure possession of a store, five-room flat and one-car garage on the premises known as 2360 North Mangle avenue, Chicago. Upon the verdict of the jury finding that defendant unlawfully withheld possession of said store, flat and garage from plaintiff, the trial court entered judgment that the latter was entitled to possession of the premises.

Plaintiff as lessor and defendant as lessee entered into a written lease of the aforementioned premises March 7, 1936, for a term beginning March 10, 1936, and expiring February 9, 1939, at a rental of \$25 a month. The rent was paid to March 10, 1937. On that date plaintiff called for the rent for the ensuing month and defendant said she could not pay then but would pay such rent if he came back March 16. No place for the payment of rent was fixed in the lease and plaintiff had always theretofore called at defendant's place of business to collect it. On the following day, March 11, 1937, plaintiff called on defendant again and left a five-day notice to pay the rent due or the lease would be terminated. This notice was signed by Edward S. Leszczynski, a stranger to the lease,

33740

MARION LESKOWSKI,
Appellant,

MARY TAVORNEY,
Appellant.

STATE OF CHICAGO,
COUNTY OF CHICAGO.

33740 A. 644

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action of forcible detainer brought by Plaintiff, Marion Leskowsky, against defendant, Mary Tavorney, to secure possession of a store, five-room flat and one-car garage on the premises known as 3300 North Lincoln Avenue, Chicago. Upon the verdict of the jury finding that defendant unlawfully withheld possession of said store, flat and garage from plaintiff, the trial court entered judgment that the latter was entitled to possession of the premises.

Plaintiff as lessor and defendant as lessee entered into a written lease of the aforementioned premises from V. 1937, for a term beginning March 10, 1938, and expiring February 9, 1939, at a rental of \$25 a month. The rent was paid to March 10, 1937. On that date plaintiff called for the rent for the ensuing month and defendant said she could not pay then but would pay some time. He came back March 16. He paid for the payment of rent was filed in the lease and plaintiff has always considered it as defendant's place of business as reflected in the following day, March 11, 1937, plaintiff called on defendant again and left a five-day notice to pay the rent due on the lease which was disregarded. This notice was signed by Edward W. Leskowsky, a witness to the lease.

by plaintiff as his agent. March 12, defendant called at the office of the Polish Roman Catholic Union regarding a notice of the assignment of the rent to it and was told that a letter would be written her by that organization stating that she might disregard such notice of assignment previously given her. This letter was received by defendant March 17, 1937. Plaintiff did not call again for the rent and March 18, 1937, an action was brought in forcible detainer based on the aforesaid five-day notice not by plaintiff, the lessor, but by Edward S. Leszozynski, designated in the five-day notice as "landlord". April 6, 1937, all the rent then due, amounting to \$25, was tendered by defendant to plaintiff and refused. After the instant action was commenced April 8, 1937, but before it went to trial defendant tendered to plaintiff \$50, the full amount of rent which had then accrued, which was likewise refused.

Plaintiff did not introduce the five-day notice in evidence on the trial of this cause and his counsel announced that he did not bring this action pursuant to such notice, claiming that the lease waived the notice and demand required by the statute. The only waiver provision in the lease is as follows:

"Said party of the second part hereby expressly waives all right to any notice or demand under any statute in this State relating to forcible entry and detainer."

The action of forcible entry and detainer or forcible detainer is a special statutory proceeding, summary in its nature and in derogation of the common law, and it follows that the conditions and requirements that the statute prescribes in conferring jurisdiction must clearly exist and that the mode of procedure provided by it must be strictly pursued. (Craft v. Calmeyer, 274 Ill. App. 296; French v. Willer, 126 Ill. 611; Fitzgerald v. Quinn, 165 Ill. 360; City of Chicago v. Steamship Lines, 323 Ill. 309.) The courts never permit

by plaintiff as his agent. March 12, 1937, defendant called at the office of the Polish Consul General in London regarding a notice of the assignment of the rent to it and was told that a letter would be written her by that consular official stating that she was there-
and such notice of assignment previously given her. This letter was received by defendant March 14, 1937. Plaintiff did not call again for the rent and March 15, 1937, an action was brought in forcible detainer based on the aforesaid five-day notice not by plaintiff, the lessor, but by Edward S. Isaacson, defendant in the five-day notice as "landlord". April 6, 1937, all the rent then due, amounting to \$45, was tendered by defendant to plaintiff and retained. After the instant action was commenced April 8, 1937, but before it went to trial defendant tendered to plaintiff \$100, the full amount of rent which had then accrued, which was likewise re-

Rever provision in the laws of the State of California, the notice and demand required by the statute. The only

"The only way to get the most out of the money is to get the most out of the money."

[illegible]

a forfeiture of a lease except upon strict compliance with the law or with the contract of the parties, by which a compliance with the law is waived. (Lane v. Brooks, 120 Ill. App. 501; McKinney v. James A. Brady Foundry Co., 175 Ill. App. 569.)

Where a lessor has the right of election to declare a forfeiture of a lease for default in the payment of rent, he must in the absence of waiver, give notice of such election. (Lane v. Brooks, *supra*; Hamer v. Butterly, 189 Ill. App. 79.) Was the provision in the lease involved here that "said party of the second part hereby expressly waives all right to any notice or demand under any statute in this state relating to forcible entry and detainer" legally effective to entitle plaintiff to bring this action without a previous declaration of forfeiture and notice to defendant of same? It was held in Clark v. Stevens, 221 Ill. App. 233, that a provision identical with that last above quoted, which was contained in the lease under consideration in that case, had no effect as a waiver of either the five day notice of the termination of a lease for failure to pay the rent as provided by sec. 8 of the Landlord and Tenant act (ch. 80, Ill. State Bar Stats., 1935) or of the "ten days notice to quit" because of defendant's default as specified in sec. 9 of said act, but only waived such notice and demand as are required under the Forcible Entry and Detainer act.

It must be conceded that plaintiff did not declare the lease forfeited because of defendant's failure to pay the rent due March 10, 1937, unless the service of the five-day notice on her on March 11, 1937, may be considered as notice of a declaration of forfeiture. But that notice was ineffective for such purpose. It was executed not by the plaintiff in the instant case, Marion Leszczynski as lessor, but by "Edward S. Leszczynski, Landlord, by Marion Leszczynski, Agent." Not only was that five-day notice served on defendant in the name of Edward S. Leszczynski, a stranger to the lease, as landlord, but a

forcible detainer action predicated upon the notice was actually instituted against her by Edward Leszczynski. It does not appear from the record when or in what manner that suit was disposed of, but it is fair to assume it was abandoned.

Notwithstanding plaintiff's position in the trial court when his counsel in objecting to the introduction of the five-day notice said "it is immaterial" and "we are not proceeding on the five-day notice," it is rather feebly urged by him here that "the five-day notice put in evidence by defendant is sufficient notice under the statute." Having expressly disclaimed any reliance upon the five-day notice on the trial, plaintiff cannot for the first time in this court urge that it was notice of a declaration of forfeiture. The only purpose really served by the five-day notice was to confuse defendant as to who was legally entitled to receive the rent from her. She had theretofore received notice from the Polish Roman Catholic Union that the rent had been assigned to that organization. It was not until March 17, 1937, that said Union advised her by letter that she might disregard this notice of the assignment of the rent to it. The five-day notice delivered to defendant March 11, 1937, was not a demand for rent by plaintiff, the lessor, but by a third party having no interest in the lease. It could not be complied with except at the defendant's peril. If she had paid the rent pursuant to the demand of Edward S. Leszczynski, she would not have discharged her obligation to pay same to the lessor, and, even though the notice authorized payment to plaintiff, Marion Leszczynski as agent for Edward Leszczynski, "landlord," such a payment would have been to an agent of a party who was a stranger to the transaction and not a payment to the lessor.

Even though we assume that the waiver provision of the lease dispensed with notice or demand when the tenant was in default, the landlord must do some overt act evidencing the fact that he has elected

to terminate the lease. (Clark v. Stevens, supra.) In Gradle v. Warner, 140 Ill. 123, where the lease contained ample provisions for forfeiture without notice after default and where the tenant tendered the rent due before the lessor had acted to declare a forfeiture, the court held at p. 131:

"It may be that the lessor was under no obligation to give the lessee any formal notice that she had elected to declare a forfeiture, but she was required to do some act to manifest an intention to declare a forfeiture, and until some act manifesting such intention was done, the lease would be in full force; and up to the time the complainant offered to pay all the rent then remaining due the lessor had done nothing showing, or tending to show, an intention to declare a forfeiture of the lease."

This action was not commenced until April 8, 1937, and it is undisputed that defendant tendered plaintiff \$25 April 6, 1937, which was all the rent due at that time. Defendant also tendered plaintiff \$50 prior to the trial of this cause, which was all the rent due at the time of this tender. Both tenders were refused. A tender of rent, if refused, is as effective to prevent a forfeiture for nonpayment of rent as is actual payment. (Chapman v. Kirby, 49 Ill. 211.) We have shown heretofore that the five-day notice served on defendant March 11, 1937, by a stranger to the lease and used as a basis of a suit by him for possession of the premises could not be construed as a notice by plaintiff of a declaration of forfeiture. While the lease gave to plaintiff a continuing option, at his election, to declare the term ended, because of defendant's default in the payment of the rent due March 10, 1937, he could not make this election and put an end to the lease and the term thereby created by any secret resolve of his own mind. From the date of defendant's default March 10, 1937, until April 6, 1937, when the tender of the rent due was made and refused, plaintiff did nothing showing or tending to show his intention to declare a forfeiture of the lease, and necessarily defendant could have had no notice of such intention. (Lane v. Brooks, Id.) This being so, no breach existed April 8, 1937, when this

to terminate the lease. (Black v. ...). In ...
 ... 1937, ...
 for forfeiture without notice after ...
 tendered the rent due before the ...
 forfeiture, the court held as follows:

"It may be that the law on this subject is ...
 the lessee any ...
 forfeiture, but she was ...
 to declare a ...
 intention to ...
 time the ...
 the lessee ...
 to declare a ..."

This action was ...
 undisputed that defendant tendered ...
 was all the rent due at that time. ...
 \$50 prior to the trial of this case, which was all the rent due at ...
 the time of this tender. ...
 rent, if refused, is as effective to prevent a ...
 month of rent as an actual payment. (Ogden v. ...)
 We have shown heretofore that the five-day notice ...
 March 11, 1937, by a ...
 suit by him for possession of the premises ...
 as a notice by plaintiff of a declaration of ...
 lease gave to plaintiff a continuing option, at his election, to ...
 declare the term ended, because of defendant's default in the payment ...
 of the rent due March 10, 1937, he could not make this election ...
 put an end to the lease and the five-day notice ...
 resolve of his own mind. From the date of defendant's default, March ...
 10, 1937, until April 6, 1937, when the ...
 made and refused, plaintiff did nothing ...
 his intention to declare a forfeiture of the lease, and necessarily ...
 defendant could have had no notice of such intention. (Linn v. ...)
 This being so, no breach existed April 6, 1937, when the

action was brought, the tender of the rent due having been made and refused two days previously.

Other points have been urged and considered, but in the view we take of this cause we deem it unnecessary to discuss them.

Since there is no dispute as to the material facts, it would serve no useful purpose to remand this cause for another trial with or without a jury. We are impelled to hold that on the evidence in the record the trial court should have directed a verdict for defendant and not having done so it should have entered judgment for defendant notwithstanding the verdict after it was returned.

The judgment of the municipal court is reversed and judgment is entered here in favor of defendant and against plaintiff.

**JUDGMENT REVERSED AND
JUDGMENT HERE.**

Friend, P. J., and Scanlan, J., concur.

collected was brought, the balance of the cost was being paid and returned two days previously.

Other points have been made and considered, but in the view we take of this case we deem it unnecessary to discuss them. There is no dispute as to the material facts, it would serve no useful purpose to repeat this. The problem is a legal one or at least a legal question. The question is whether the evidence in the record is sufficient to establish a verdict for defendant and not having done so it should have been judgment for defendant notwithstanding the verdict after it was returned.

The judgment of the municipal court is reversed and judgment is entered here in favor of defendant and against plaintiff.

JUDICIAL DEPARTMENT
JULY 10, 1910.

Friend, P. J., and Council, J., concur.

58X 1258
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 5th day of October, in
the year of our Lord one thousand nine hundred and thirty-seven,
within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice

Hon. FRED G. WOLFE, Justice

Hon. BLAINE HUFFMAN, Justice

JUSTUS L. JOHNSON, Clerk

RALPH H. DESPER, Sheriff

292 I.A. 645'

BE IT REMEMBERED, that afterwards, to-wit: On DEC 2 1937
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, to-wit:

Gen. No. 9258

Agenda No. 17

In the Appellate Court of Illinois

Second District

October Term, A. D. 1937

Illinois National Underwriters

Company, a corporation,

Appellee,

vs.

David D. Freeman, et al,

Appellants,

Appeal from the Circuit Court
of Livingston County

DOVE - J.

A proceeding was instituted in the Circuit Court of Livingston County by the Chicago National Life Insurance Company to foreclose a mortgage executed by David D. Freeman and Mary Freeman, his wife. After the cause was at issue and on March 31, 1932 the cause was referred to the Master in Chancery to take and report the evidence, his findings of fact and conclusions of law. On March 25, 1935 the Master filed his report recommending that a decree be entered finding that the note and mortgage were executed without consideration and that they be, by decree, declared null and void and set aside and held for naught. Accompanying this report over the signature of the Master appears the following: "Costs to be taxed: Master's report, proofs, testimony and reporter's fees, as itemized and submitted to counsel . . . \$1,005.25. Credit by payments on account (1/2 by complainant and 1/2 by defendant Freeman) . . \$605.25; Balance due \$400.00. I hereby certify that it was necessary to employ the services of a stenographer in this cause". On July 11, 1935 a decree was rendered overruling exceptions filed by the plaintiff to the Master's report, approving the same and providing, among other things, that the defendant Freeman recover all costs from the plaintiff and providing that a fee bill and execution might issue. The costs taxed amounted

In the Appellate Court of Illinois

Second District

October Term, A. D. 1937

Illinois National Underwriters

Company, a corporation,

Appellee,

vs.

David D. Freeman, et al,

Appellants,

Appeal from the Circuit Court
of Livingston County

DOVE - 1.

A proceeding was instituted in the Circuit Court of

Livingston County by the Chicago National Life Insurance Company

to foreclose a mortgage executed by David D. Freeman and Mary

Freeman, his wife. After the cause was at issue and on March 31,

1938 the cause was referred to the Master in Chancery to take and

report the evidence, his findings of fact and conclusions of law.

On March 25, 1938 the Master filed his report recommending that a

decree be entered finding that the note and mortgage were executed

without consideration and that they be, by decree, declared null

and void and set aside and held for naught. Accompanying this

report over the signature of the Master appears the following:

"Costs to be taxed: Master's report, prolix, testimony and re-

porter's fees, as itemized and submitted to counsel . . . \$1,000.00.

Credit by payments on account (1/2 by complainant and 1/2 by

defendant Freeman) . . . \$65.25; Balance due \$400.00. I hereby

certify that it was necessary to employ the services of a sten-

ographer in this cause". On July 11, 1938 a decree was rendered

overruling exceptions filed by the plaintiff to the Master's report,

approving the same and providing, among other things, that the

defendant Freeman recover all costs from the plaintiff and providing

to \$738.88. Thereafter and on October 4, 1935, Freeman's attorney filed a praecipe for an execution and an execution was thereupon issued directed to the sheriff of Cook County for said sum of \$738.88.

On March 17, 1937, a petition, afternotice was given, was filed by Freeman seeking to have the costs of the reference re-taxed and that the Master be ordered to refund to him whatever amount may appear upon the hearing to have been received by the Master in excess of the amount, if any, to which he was entitled. Upon a hearing, this motion was denied and this appeal follows:

The record discloses that on August 31, 1934 the Master, before whom the cause was pending, wrote counsel for Freeman to the effect that the written briefs and arguments had been filed by all the parties in interest and requesting payment of \$407.67, the balance due from him for Master's fees and stating that no report would be forthcoming until the fees were paid. Accompanying this letter was the following statement, over the signature of the Master:

"Chicago National Life v. Freeman, No. 6004.
Master in Chancery costs.

344 pages of testimony @ .45 - M in C	\$154.80
344 pages of testimony @ .45 - Reporter	154.80
Com. Exhibits 32 pages @ .45	14.40
Gross-comp. Exhibits 25 pages @ .45	11.25
18 hearings (12 principal hearings @ \$10.00	120.00
Report . Fee	550.00
	<u>\$ 1005.25</u>
Credits	189.90
Balance due	<u>\$ 815.35</u>
Illinois Nat'l Underwriters (Comp)	407.67
D. D. Freeman (defendant)	407.67

"Briefly in this case there are 222 pages of original pleadings, 80 detailed exhibits, 344 pages of testimony, 18 hearings before Master, 67 letters and telegrams exchanged between Master and counsel, 207 pages of briefs and arguments presented for consideration, citing innumerable cases (184 cases cited by defendant Freeman's brief alone)."

On March 15, 1935, Freeman paid the Master \$208.00, having previously paid him \$92.33. The plaintiff had paid the Master \$297.38. These sums aggregate \$597.71, leaving a balance of \$407.54 remaining due the Master, although when he filed his

to \$738.88. Thereafter and on October 4, 1935, Freeman's attorney filed a prescipe for an execution and an execution was thereupon issued directed to the sheriff of Cook County for said sum of \$738.88. On March 17, 1937, a petition, attachment was given, was filed by Freeman seeking to have the costs of the reference taxed and that the Master be ordered to refund to him whatever amount may appear upon the hearing to have been received by the Master in excess of the amount, if any, to which he was entitled. Upon a hearing, this motion was denied and this appeal follows:

The record discloses that on August 31, 1934 the Master, before whom the cause was pending, wrote counsel for Freeman to the effect that the written briefs and arguments had been filed by all the parties in interest and requesting payment of \$407.67, the balance due from him for Master's fees and stating that no report would be forthcoming until the fees were paid. Accompanying this letter was the following statement, over the signature of the Master:

"Chicago National Life v. Freeman, No. 8004.
Master in Chancery estate.

344 pages of testimony @ .45 - M in C	154.80
344 pages of testimony @ .45 - Reporter	154.80
Com. Exhibits 38 pages @ .45	17.10
Gross-comp. Exhibits 38 pages @ .45	17.10
18 hearings (18 principal hearings @ \$10.00	180.00
Report. Fee	20.00
	<u>503.80</u>
Credits	154.80
Balance due	<u>349.00</u>
Illinois Nat'l Underwriters (Corp)	107.27
D. N. Freeman (defendant)	107.27

"Briefly in this case there are 344 pages of original testimony, 80 detailed exhibits, 344 pages of testimony, 18 hearings before Master, 87 letters and telegrams exchanged between Master and counsel, 307 pages of briefs and arguments presented for consideration, citing innumerable cases (181 cases cited by defendant Freeman's brief alone)."

On March 15, 1935, Freeman paid the Master \$503.80, having previously paid him \$92.33. The plaintiff had paid the Master \$297.38. These sums aggregate \$297.71, leaving a balance

report it stated that he had received \$605.25 instead of \$597.71 and that the balance remaining due him was \$400.00 instead of \$407.54. The \$738.88 which the clerk taxed as costs and which the decree ordered the plaintiff to pay was made up of the \$400.00 unpaid Master's fee, \$300.33 which had been advanced to the Master by the defendant and a few other items.

It is insisted by counsel for appellant that the proper amount to have been allowed the Master for his services in taking and reporting the evidence is \$250.05, exclusive of the exhibits and the further sum of \$14.40 for reporting the exhibits of the plaintiff and \$11.25 for reporting the exhibits of the defendant. That his claim for \$120.00 for twelve hearings at \$10.00 each should not be allowed, nor should he receive anything for examining the questions in issue and reporting his conclusions of law and fact. Counsel for appellee contend that by failing to file any objections to the Master's fees as shown by his report and by procuring the rendition of a decree in his favor for the amount the Master reported to be due him and by suing out an execution upon that decree, appellant has approved the same and is estopped to now complain. That the testimony reported by the Master consisted of 344 pages, each page of which he estimated contained 300 words and that he made the statutory charge therefor and that his other charges for determining and reporting his conclusions are not unreasonable.

A witness called by appellant testified that he counted the words on the 344 pages of testimony reported by the Master and found that they contained 74,809 words. At the statutory rate the Master was therefore entitled to charge \$224.42 therefor. His charge of \$25.65 for reporting the exhibits is conceded by counsel for appellant to be correct. The Master was, therefore, legally entitled to receive \$250.07 and also reasonable and fair compensation for reporting his conclusions of law

report it stated that he had received \$200.00 instead of \$207.71 and that the balance remaining due him was \$400.00 instead of \$407.71. The \$200.00 which the clerk found as correct was what the George ordered the Plaintiff to pay was made up of the \$200.00 unpaid Master's fee, \$300.00 which had been advanced to the Master by the defendant and a few other items.

It is stated by counsel for appellant that the amount to have been allowed the Master for his services is stated and reported the evidence is \$280.00, exclusive of the exhibits and the further sum of \$14.40 for reporting the exhibits of the Plaintiff and \$11.25 for reporting the exhibits of the defendant. That his claim for \$280.00 for twelve hours at \$25.00 each should not be allowed, nor should he receive anything for examining the questions in issue and reporting his conclusions of law and fact. Counsel for appellee contends that by failing to file any objections to the Master's fees as shown by his report and by procuring the rendition of a decree in his favor for the amount the Master reported to be due him and by entering an election upon that decree, appellant has approved the same and is estopped to now complain. That the testimony reported by the Master consisted of 344 pages, each page of which he estimated contained 300 words and that he made the statutory charge therefor and that his other charges for determining and transcribing his conclusions are not unreasonable.

A witness called by appellant testified that he counted the words on the 344 pages of testimony reported by the Master and found that they contained 74,309 words. At the same time the Master was therefore entitled to receive \$23,507.71 therefor. His charge of \$280.00 for reporting the exhibits is conceded by counsel for appellant to be correct. The Master was, therefore, legally entitled to receive \$23,507.71 and his testimony and fair compensation for reporting his conclusions of law

and fact. The Master's charge of \$120.00 for twelve hearings at \$10.00 each cannot be sustained and his counsel concede that it is not authorized by the statute.

The Master's report did not specify the time he was necessarily employed in examining the questions of law and fact and in preparing his report of his findings and conclusions, but he testified upon the hearing to the effect that although he kept no record of the time he actually spent in going over the testimony, completing his report, and in reading the briefs and arguments but that it was between thirty and forty days. The record before us does not contain the Master's report and in its absence we are not in the position of the chancellor who could take judicial notice of the entire record. It does appear, however, that the pleadings alone consisted of 222 typewritten pages, that there were 344 pages of typewritten testimony, 57 pages of exhibits and 207 typewritten pages of briefs submitted to the Master. Certainly the Master is entitled to some compensation for his services.

There may be some merit in appellee's contention that appellant, not having filed any objections or exceptions to the Master's report, and knowing that the clerk had taxed the costs in accordance therewith and having caused an execution to be issued, should be estopped from now questioning the correctness of the Master's charges. Appellee, however, did not present this question to the lower court. No answer to appellant's petition to retax the costs was filed and in this condition of the record, this question is not properly before us for review.

The motion of appellant should have been sustained in part and the order appealed from will therefore be reversed and the cause remanded with directions to retax the Master's fees allowing to him \$250.07 for taking and reporting the testimony and exhibits and \$450.00 for reporting his conclusions of law and fact. Of this amount to which the Master is entitled, aggregating \$700.07

and fact. The Master's charge of \$150.00 for twelve hours at \$10.00 each cannot be sustained and his counsel conceals that it is not authorized by the statute.

The Master's report did not specify the time he was

necessarily employed in examining the questions of law and fact and in preparing his report of his findings and conclusions, but he testified upon the hearing to the effect that although he has no record of the time he actually spent in going over the testimony, completing his report, and in reading the briefs and arguments but that it was between thirty and forty days. The record before us does not contain the Master's report and in the absence we are not in the position of the chancellor who could take judicial notice of the entire record. It does appear, however, that the pleadings alone consisted of 122 typewritten pages, that there were 344 pages of typewritten testimony, 57 pages of exhibits and 907 typewritten pages of briefs submitted to the Master. Certainly the Master is entitled to some compensation for his services.

There may be some merit in appellee's contention that appellant, not having filed any objections or exceptions to the Master's report, and knowing that the clerk had taken the case in accordance therewith and having caused an execution to be issued, should be estopped from now questioning the correctness of the Master's charges. Appellate, however, did not present this question to the lower court. Its answer to appellant's petition to relax the costs was filed and in this condition of the record, this question is not properly before us for review.

The motion of appellant should have been sustained

in part and the order appealed from will therefore be reversed and the cause remanded with directions to relax the Master's fees allowing to him \$250.00 for taking and reporting the testimony and exhibits and \$250.00 for reporting his conclusions of law and fact.

he has received \$297.38 from the plaintiff and \$300.33 from appellant or a total of \$597.38, leaving a balance of \$102.69 still due the Master. In theory each party to a lawsuit pays his own costs as he makes them. What part of the Master's costs were incurred by appellant does not appear on this record. He voluntarily paid to the Master (\$300.33 and before he can be held liable for any further sum, It must be shown that he incurred those costs.

Reversed and Remanded with Directions.

he has received \$27.78 from the plaintiff and \$200.00 from defendant
or a total of \$227.78, leaving a balance of \$100.00 still due the
Master. In theory each party to a lawsuit pays his own costs as
he makes them. That part of the Master's costs were incurred by
appellant does not appear on this record. He voluntarily paid to
the Master (\$200.00 and before he can be held liable for any further
sum, it must be shown that he incurred those costs.
Reversed and remanded with directions.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court. in and
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand nine
hundred and thirty-_____

Clerk of the Appellate Court

59A

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 5th day of October, in
the year of our Lord one thousand nine hundred and thirty-seven,
within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice

Hon. FRED G. WOLFE, Justice

Hon. BLAINE HUFFMAN, Justice

JUSTUS L. JOHNSON, Clerk

RALPH H. DESPER, Sheriff

292 I.A. 645²

BE IT REMEMBERED, that afterwards, to-wit: On DEC 2 1937

the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, to-wit:

(Consolidated)

In the Appellate Court of Illinois

Second District

October Term, A. D. 1937

Paul A. Cushman, as Successor in
Trust, etc.,

Appellee,

vs.

W. T. Pierce and Charles Norton,
Appellants,

59A
Appeal from the Circuit Court
of Henry County

HUFFMAN - J.

Appellee brought separate suits against appellants upon certain notes. The issues in this appeal arise from the pleadings. The points involved are the same and the cases have been consolidated for the purpose of review.

Appellants in their respective cases each filed an answer and a counterclaim. Motions were filed to dismiss the counterclaims, and on April 24, 1936, the motions were granted. Subsequently, each appellant filed an amended counterclaim. These were stricken on motion under date of December 4, 1936. On February 2, 1937, appellants made motion for leave to file second amended counterclaims, accompanying said motions with copies of such counterclaims. On February 18, 1937, the court made an entry denying leave to file such second amended counterclaims. On March 10, 1937, appellants filed their respective notices of appeal, and now present to this court by such appeal the action of the trial court in granting motions to strike the original counterclaims, the first amended counterclaims, and the refusal of leave to file second amended counterclaims.

Appellee filed his motion to dismiss the appeals upon the grounds that they were not prosecuted within the statutory period of time with respect to the orders of April 24, and December 4, 1936, and that in any event, none of the orders of the

(Continued)

IN THE SUPREME COURT OF ILLINOIS

Second Criminal

Between People v. A. J. [illegible]

Paul A. [illegible], as Respondent in

Crime, vs.,

Appellants,

vs.

W. T. [illegible] and Charles [illegible],

Respondents.

NO. 1 - 1

Appellants brought separate writs of habeas corpus

upon certain nodes. The issues in this appeal arise from the

pleadings. The points involved are the facts and the legal ones

been consolidated for the purpose of review.

Appellants in their respective cases each filed an

answer and a counterclaim. Answers were filed to dismiss the

counterclaims, and on April 18, 1935, the motion was granted.

Subsequently, each appellant filed an amended counterclaim. These

were returned on motion under Rule 12, December 4, 1935. On May

27, 1935, appellants made motion for leave to file answers

amended counterclaims, accompanied with certain affidavits

and counterclaims. On January 15, 1936, the motion was granted

granting leave to file said second amended counterclaims. On March

10, 1936, appellants filed their respective answers to appeal, and

now present in this court by submission for action of the court

court in granting motions to dismiss the original counterclaims.

The first amended counterclaim, and the answer of [illegible] to this

second amended counterclaim.

Answers filed by [illegible] in dismissal for reasons stated

The grounds that they have not presented within the time

period of time with respect to the motion of [illegible] and [illegible]

trial court complained of were final and appealable orders. This motion for the purpose of this review, was taken with the case.

The order of the court entered on February 18, 1937, denying appellants leave to file second amended counterclaims, granted them ten days from that date in which to further plead. Following this order, no further steps were taken by appellants, except to prosecute these appeals. The complaint and answer in each case remain undisposed of.

No final order, judgment or decree was entered by the trial court in its disposition of any of the three motions herein complained of. Barber v. Wood, 318 Ill. 415; First Trust, etc., Bank v. Cutler, 286 Ill. App. 6.

The appeal in each of the above cases is therefore dismissed.

Appeals dismissed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this_____day of
_____in the year of our Lord one thousand nine
hundred and thirty-_____

Clerk of the Appellate Court

9234

~~1~~

AT A TERM OF THE APPELLATE COURT,
Begun and held at Ottawa, on Tuesday, the 5th day of October, in
the year of our Lord one thousand nine hundred and thirty-seven,
within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice

Hon. FRED G. WOLFE, Justice

Hon. BLAINE HUFFMAN, Justice

JUSTUS L. JOHNSON, Clerk

RALPH H. DESPER, Sheriff

292 I.A. 645³

BE IT REMEMBERED, that afterwards, to-wit: On DEC 2 1937
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, to-wit:

In the Appellate Court of Illinois,

Second District

October Term, A.D. 1937

In the Matter of the Alleged

Insanity of Grace Wilbur.

(Grace Wilbur,

Appellant)

Appeal from the County Court
of Winnebago County

HUFFMAN - J.

This is an appeal by appellant from the action of the county court of Winnebago County in sustaining a motion to strike a petition filed by said appellant. Pursuant to an application filed on August 30th, 1934, appellant was adjudged to be insane and was committed to the Elgin State Hospital. She remained in said institution until May 9, 1936, when she was paroled by the Superintendent. On August 7, 1936, she was discharged from said hospital by order of the Superintendent. Subsequently, she filed her petition in the said county court for restoration, and pursuant thereto the said court on October 5, 1936, entered its order and judgment finding that said appellant was then restored to reason and entitled to be restored to all her legal rights and privileges as a sane person.

On March 26, 1937, appellant filed her petition in the said county court setting up certain alleged irregularities connected with the proceedings had in the determination of her insanity and commitment to the state hospital, which irregularities she claims deprived the court of jurisdiction and that therefore the entire proceedings were void. The petition asked that the court revoke, vacate and annul the entire record of such proceedings. To this petition the defendants (the conservator and the petitioner connected with the insanity proceedings), filed their motion to strike. The court sustained the motion to strike, making the following entry: "And be it remembered, that on this 19th

IN THE APPELLATE COURT OF ILLINOIS

SECOND DIVISION

October Term, A.D. 1937

In the Matter of the Affair

Involving the Estate of

(Grace Wilson,

Deceased)

Appellant)

REPLY - 1

This is an appeal by appellant from the order of

the County Court of Williamson County in sustaining a ruling in

reply to a petition filed by said respondent. Judgment is so

affirmed. The petition was filed on August 10, 1935, and was

to be heard and was heard by the County Court on August 10,

1935, and in said petition was set out, among other things,

that by the respondent, on August 7, 1935, she had

charged from said petition by action of the respondent, and

petition, and returned answers and said court on August 10,

1935, entered the order and judgment finding that said respondent

was then ordered to return and answer to be returned to all

her legal rights and divisions as a bona fide

On March 22, 1937, appellant filed her petition in

the said county court setting up certain alleged wrongdoings

connected with the respondent and to the respondent at the

respondent was committed to the State Prison, with instructions

the claims against the County of Williamson and said respondent

the claims proceedings were void. The petition also set out

that respondent, under and among the other things, had

infringed on the rights of the respondent (the respondent) and

petitioner connected with the respondent, and

action to return. The court sustained the ruling in reply, and

day of April, A. D. 1937, the defendants herein by their attorneys, file motion to strike the petition filed in behalf of Grace Wilbur on March 25, 1937; and upon the hearing of said motion to strike, it is hereby ordered by the court that said motion be and the same is hereby sustained." This appeal is prosecuted by appellant from the above order.

The order of the county court sustaining the above motion to strike the petition of appellant does not make any final disposition of the case. An appeal will not lie from an order of such a character, as there is no final judgment entered. First Trust, etc., Bank v. Cutler, 286 Ill. App. 6. Under such circumstances, a court of review will of its own motion dismiss the appeal. Barber v. Wood, 318 Ill. 415. The appeal herein is dismissed.

Appeal dismissed.

day of April, A. D. 1867, the defendants herein by their attorneys,
this motion to strike the petition filed in behalf of George Wright
on March 20, 1867; and upon the motion of said motion to strike,
it is hereby ordered by the court that said motion be and the
same is hereby sustained. This appeal is dismissed by reason
that from the above order.

The order of the court herein sustaining the motion
motion to strike the petition of plaintiff herein was not made any kind
disposition at the time. No appeal will lie from an order of
such a character, as there is no final judgment entered. *Trust*
Trust, etc., Trust v. Trust, 200 Cal. 2d, 200. Under such circum-
stances, a writ of review will lie from an order of the
court. *Trust v. Trust, 200 Cal. 2d, 200.* The appeal herein is
dismissed.

Whereas the court herein sustained the motion to strike the
petition of the plaintiff, the defendants herein by their attorneys,
this motion to strike the petition filed in behalf of George Wright
on March 20, 1867; and upon the motion of said motion to strike,
it is hereby ordered by the court that said motion be and the
same is hereby sustained. This appeal is dismissed by reason
that from the above order.

The court hereby ordered that the motion to strike the
petition of the plaintiff, the defendants herein by their attorneys,
this motion to strike the petition filed in behalf of George Wright
on March 20, 1867; and upon the motion of said motion to strike,
it is hereby ordered by the court that said motion be and the
same is hereby sustained. This appeal is dismissed by reason
that from the above order.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 5th day of October, in
the year of our Lord one thousand nine hundred and thirty-seven,
within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice

Hon. FRED G. WOLFE, Justice

Hon. BLAINE HUFFMAN, Justice

JUSTUS L. JOHNSON, Clerk

RALPH H. DESPER, Sheriff

292 I.A. 645⁴

BE IT REMEMBERED, that afterwards, to-wit: On DEC 2 1937
the Opinion of the Court was filed in the Clerk's Office of said
Court, in the words and figures following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, 1937

Josephine Shuneman, Administratrix
of the Estate of Burdette Claire
Cleveland, deceased,

Plaintiff-Appellee,

vs.

Arthur V. Gage,

Defendant-Appellant,

Appeal from the Circuit
Court Stephenson County

WOLFE - J.

This action is a suit for damages brought by Josephine Shuneman, administratrix of the estate of Burdette Claire Cleveland, deceased, whom it is claimed, was struck and killed by an automobile while she was crossing a roadway in Freeport, Illinois, on March 19, 1935. The first three counts of the complaint charge that Arthur V. Gage, the defendant, was driving his car in a negligent manner in said City of Freeport, and ran into and injured the plaintiff's intestate and that such injury caused her death; that at the time of said collision the plaintiff intestate was in the exercise of all due care and caution for her own safety. The fourth count of the complaint charges that the defendant wantonly, wilfully, and recklessly drove his automobile against the plaintiff's intestate, and on account of such wilful and wanton conduct she was killed.

To this complaint the defendant filed a general denial. He denied that he drove his automobile upon and against the plaintiff's intestate and thereby caused her death. The case was tried before a jury who found the issues in favor of the defendant. On motion of the plaintiff, the court set aside the verdict of the jury and granted the plaintiff a new trial. It is from the action of the court in setting aside the verdict and granting a new trial that

In the County of Illinois

Second District

County of Cook, Ill.

Joseph Shuman, Administrator

of the Estate of Arthur V. Gage

deceased,

Plaintiff,

vs.

Arthur V. Gage,

Defendant.

WOLF - 1.

This action is a suit for damages brought by Joseph

Shuman, Administrator of the Estate of Arthur V. Gage, deceased, whom it is claimed, was struck and killed by an automobile while she was crossing a roadway in Freeport, Illinois, on March 10,

1938. The first three counts of the complaint charge that Arthur V. Gage, the defendant, was driving his car in a negligent manner

in said City of Freeport, and ran over and injured the plaintiff's intestate and that such injury caused her death; that at the time

of said collision the plaintiff's intestate was in the company of

all discrete and caution for her own safety. The fourth count

of the complaint charges that the defendant, plaintiff, and

recklessly drove his automobile against the plaintiff's in-

testate, and on account of such willful and wanton conduct she

was killed.

To this complaint the defendant filed a general denial. He

denied that he drove his automobile down and against the plaintiff's

intestate and thereby caused her death. The case was tried before

a jury who found the issues in favor of the defendant. On motion

of the plaintiff, the court set aside the verdict of the jury and

granted the plaintiff a new trial. It is from the action of the

the defendant appealed the case to this court for review.

We do not have the benefit of the statement of the trial court telling why he granted a new trial, but we have searched the record to ascertain his reasons for the same. Approximately fifty witnesses testified at the hearing of the case, some in favor of the plaintiff and some in favor of the defendant. If the trial court, who has heard the evidence and observed the witnesses' demeanor on the witness stand together with all the facts and circumstances appearing to the court during the trial, is of the opinion that the verdict of the jury is manifestly against the weight of the evidence, then it is his duty to set aside the verdict and grant a new trial. (White v. City of Belleville, 364 Ill. 574; Mijawa v. C. & A. Ry., 175 Ill. App. 325; I. C. R. R. v. Smith, 208 Ill. 608). An examination of the abstract shows that the witnesses differ materially in their testimony.

The matter of granting a new trial is largely in the discretion of the trial court, and unless this court can say that that discretion has been abused, we would not be justified in reversing his decision. After reviewing the whole case we cannot say that the trial court abused his discretion in setting aside the verdict of the jury and granting the plaintiff a new trial.

The order of the trial court in setting aside the verdict of the jury and granting the plaintiff a new trial, is hereby affirmed.

Judgment affirmed.

The defendant appealed the case to the Court of Appeals.

He did not have the benefit of the decision of the trial

court before he presented a new trial, but he had exhausted

the remedy to exhaust his remedy for a new trial.

His witnesses testified at the hearing of the case, when he later

the plaintiff and some in favor of the defendant. If the trial court,

who had heard the evidence and observed the witnesses, believed in

the witness stand together with all the facts and circumstances

appearing to the court during the trial, is of the opinion that

the verdict of the jury is manifestly against the weight of the

evidence, then it is his duty to set aside the verdict and grant

a new trial. (White v. City of Louisville, 184 Ky. 174; 191 Ky.

v. O. & A. Ry., 175 Ky. 174; 191 Ky. 174; 191 Ky. 174; 191 Ky.

174). An examination of the evidence shows that the witnesses

differ materially in their testimony.

The matter of granting a new trial is largely in the dis-

cretion of the trial court, and unless the court can say that

that discretion has been abused, no error can be said to exist in re-

versing his decision. After reviewing the whole case as before

said that the trial court abused his discretion in setting aside

the verdict of the jury and granting the plaintiff a new trial.

The error of the trial court in setting aside the verdict

of the jury and granting the plaintiff a new trial, is hereby

affirmed.

Respectfully submitted,

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

Union filed - Oct - 15 - 1937

PUBLISHED IN ABSTRACT

Mack Henry, Appellee, v. East and West Insurance
Company of New Haven, Connecticut, a Cor-
poration, Appellant.

Appeal from Circuit Court, Adams County.

JANUARY TERM, A. D. 1937.

292 I.A. 646¹

Gen. No. 9039

Agenda No. 13

MR. JUSTICE FULTON delivered the opinion of the Court.

Mack Henry, the Appellee, filed a bill in Chancery in the Circuit Court of Adams County against the Appellant Insurance Company, setting forth that, on January 15th, 1932, Appellant issued a policy of fire insurance covering certain household goods and chattel property owned by the Appellee and located in his residence at Topeka, Illinois, in the amount of \$1,500.00.

The bill also alleged that the said policy of insurance was lost or destroyed and that the Appellee had made diligent search and inquiry for the same, but to no avail; that on February 18th, 1932, the residence of the Appellee, together with all his household goods and personal effects, was destroyed by fire and that the fair, cash, market value of the insured property was \$1,334.70. The complaint further alleged that Appellant had immediate notice of the loss through its duly authorized agent; that the Appellee applied to the duly authorized agent of the Appellant for adjustment and payment of the loss and for the necessary blanks to make proof of loss, but that the said agent denied liability and refused to deliver the necessary blanks to Appellee, whereby the Appellant waived the requirements of furnishing the proof of loss. It further alleged that the terms and provisions of the said insurance policy were not known to Appellee, but were known to the Appellant and that the facts concerning said insurance policy were known to no person except the Appellant; and that discovery was necessary to assist the Court in granting the relief prayed. The bill also alleged that the Appellee was without adequate remedy at law and that it was necessary to resort to equity to assist Appellee in securing his rights under said policy and to obtain discovery of Appellant concerning the terms and provisions of said policy.

After a plea in abatement and various demurrers filed on the part of the Appellant were disposed of and the bill amended, the Appellant filed an answer admitting the execution of said policy, but denying most of the material allegations of the bill of complaint. The Appellee also attached to his answer a copy of the insurance policy, which forms the basis of this suit. The cause was referred to a Master in Chancery, who heard the testimony and filed his report finding that certain articles of personal property were destroyed by fire and fixing the fair, cash value thereof. Also that Appellee was the owner thereof; that Appellant was immediately notified of the fire and the loss; that Appellee applied for adjustment and payment of the loss and that liability was denied; that the policy had been lost and search made therefor and that Appellant had never paid the loss or any part of the premium paid on said policy. Upon a hearing of the exceptions to the Master's report the trial Court sustained the findings of the Master, and by its decree found that at the time of filing suit the Appellee had no means of knowing or determining the contents of said insurance policy; that the discovery thereof was necessary to assist the Court in granting proper relief and that the Appellant alone could furnish such information. Both the Master and the trial Court found the aggregate value of the personal property destroyed by fire to be \$747.55, which is the amount found in the decree. It is from this decree that the Appellant prosecutes an appeal.

Briefly, the facts disclose that the Appellee in December, 1931, was a resident in Marcelline, Missouri. On January 1st, 1932, he rented a house in the village of Topeka, Illinois, and moved three truck loads of furniture and household goods to his new residence. On January 15th, 1932, he procured an insurance policy from James M. Gregory of Havana, Illinois, a soliciting agent for the Appellant Insurance Company. On February 18th, 1932, the building, which he had rented from one Rilea, was destroyed by fire. Within a day or two after the fire he notified James M. Gregory of his loss and Gregory visited the premises immediately. The Appellee testified that Gregory told him to make out his proof of loss and that the adjuster would be up in a few days to settle his claim; that Gregory told him to come back in a few days to meet the adjuster, which he did, and they arrested him and he was confined to the jail for about ten days; that

after he got out of jail he had another conversation with Gregory in the presence of two of Appellee's witnesses, Lyle Barrett and Homer Medlin. He asked Gregory if the adjuster had been out to look over the premises and Gregory replied that he had, and that they had concluded they did not owe him anything; that he asked Gregory again for proof of loss and that Gregory refused to comply with his request and stated that the company did not owe him anything. As to the facts concerning the moving, the Appellee was corroborated by the testimony of Carl Barrett, who hauled two of the truck loads at the time of the moving; by Lyle F. Barrett, a friend of the Appellee at Marcelline, and by Homer Medlin, an employe of Lyle Barrett. These witnesses further testified to the contents of the house in which the Appellee lived, and also to the articles of furniture and household goods moved by Appellee and the value of the same. Both Lyle Barrett and Homer Medlin testified to being present and hearing the conversation between the Appellee and James M. Gregory, wherein the latter refused to give the Appellee blanks for making proof of loss, and notified him that the company did not owe him anything.

After the fire the Appellee moved back to Marcelline, Missouri, and instituted two different causes of action in the State of Missouri on this policy. He testified that he had delivered the policy to his attorneys and that, through no fault of his own, the instrument was lost or destroyed; that he had made diligent search to find the same, but was unable to do so.

For the Appellant, James M. Gregory testified as to the issuance of the policy, the notification to him by the Appellee of the loss, but denied having the conversation above referred to in the presence of Barrett and Medlin. He also testified that he notified Appellee that he had no power or authority to adjust losses or to either deny or affirm liability on the part of the Appellant. Charles H. Long, who had never seen the furniture or household goods, testified as to the value. Other witnesses testified as to having been in the Appellee's house on one or two occasions and that they had never seen many of the articles which the Appellee claimed to have owned and lost in the fire. None of these witnesses had made any inspection of all the rooms in the house occupied by Appellee and had made only scant observation of the contents.

Outside of the question of fact the Appellant relies upon two main errors for reversal,—first, that a Court of Equity has no jurisdiction of the cause, and that the Appellee had an adequate remedy at law. Second,—that the Appellant was deprived of a right of trial by jury, in violation of Sec. 5, of Art. 2 of the State constitution. It is insisted by the Appellant that the policy sued on was merely a simple or unsealed contract, and that the loss of the instrument does not, in and of itself, give a Court of equity jurisdiction, and that therefore the remedy at law was complete and adequate.

The Appellee contends that to constitute an adequate remedy at law, the remedy at law must be clear, complete and as practical and efficient to the ends of justice as the remedy in equity. He insists that his right to relief in a Court of equity is on the grounds of discovery. In his bill he alleged that the policy of insurance was lost or destroyed; that he had made diligent search and inquiry therefor, but to no avail; that the terms and provisions of said policy were not known to him, but were known to Appellant; that the facts alleged in said bill are known to no other person than the Appellant and its agents; that the facts sought to be discovered can only be ascertained upon discovery and furnishing of said copy by Appellant; that Appellant alone can give it, and that such discovery is indispensable.

The controlling question, therefore, is whether or not the Circuit Court had jurisdiction to enter a money decree. If a bill be filed for both discovery and relief, unless there is jurisdiction in equity to grant the relief prayed, then the entire bill, including the part for discovery, must be dismissed. Equity has no jurisdiction to enforce purely legal demands in the absence of special circumstances.

In *Hogg v. Hohmann*, 330 Ill., 589, the Court said, "To hold that because he gave his note, and it was taken from the possession of the payee by other parties interested in his estate, or that it was lost and therefore his liability can be determined in an equitable proceeding, is an unwarranted extension of equitable jurisdiction. That jurisdiction is as clearly defined as Courts of Law." And again:

"The courts of law have long been able to entertain actions upon lost or destroyed bonds and other sealed instruments since the ancient requirement of proof by the plaintiff has been

abrogated. Statutes have generally been enacted in the American States which permit action at law on lost negotiable paper to be brought by the owner who was simply required as a preliminary step to execute and file a bond of indemnity to the defendants. In this manner the necessity for equitable interference has been removed and all such actions to recover a money judgment upon lost obligations or negotiable instruments are brought in courts of law, according to the legal modes of procedure.' (1 Pomeroy's Eq. Juris., 4th Edition—section 71). Section 14 of the negotiable instrument act is now as enacted in the revision of 1874 and provides for requirement of indemnity where a lost instrument is made the basis of an action of defense by way of set-off. The instruments and means of proof are the same in suits in equity as in actions at law. It is elementary doctrine that a bill in equity seeking recovery against an adversary must disclose facts showing that the relief sought comes within the equitable jurisdiction. If not so averred and proved at the hearing as averred, relief will be denied and the bill dismissed for want of equity."

In this case the bill of Appellee set up rather fully the terms and contents of the policy and his affidavit attached thereto stated that he knew the contents thereof of his own knowledge. The testimony shows that he had the policy in his possession after the loss; that he started two separate suits, based upon the policy, in the State of Missouri before instituting the present suit. There is no statement in his pleadings that he was ever unable to procure a copy of the policy or that he did not know its contents. Even if all this were not so the Appellee was not without remedy at law to secure such proof. Sec. 9 of the Evidence Act in force in 1931 provides

"The several courts shall have power, in any action pending before them, upon motion and good and sufficient cause shown, and reasonable notice thereof given, to require the parties, or either of them, to produce books or writings in their possession or power, which contain evidence pertinent to the issue."

This section gave Appellee power to compel Appellant to produce any books or writings showing the terms of the policy upon which recovery is sought. The necessity then for resorting to equity in this case

does not appear. The Courts do not permit a plaintiff to resort to discovery, and then, having done so, continue on to get relief of a purely legal nature.

In *Hogg v. Hohmann, Supra*, the Court said

“The recovery here allowed is upon a purely legal demand, and if an action had been brought at law, either of the parties would have been entitled to a jury on the trial. Courts will not permit parties to sue in Chancery and upon failure to establish any basis for equitable relief, have the bill retained for the purpose of a recovery upon a purely legal demand. To allow this to be done would be to deprive the defendant of his constitutional right of trial by jury.”

We do not believe the record in this case shows any basis for equitable relief. The Appellee attempted to use discovery as a means for obtaining relief of a purely legal nature.

It is our judgment that the Chancellor erred in assuming equity jurisdiction in this suit against Appellant and that the decree entered in the Circuit Court be reversed and remanded, with directions either to dismiss the Bill for want of equity, or, in the discretion of the Court, to transfer the suit to the law docket of the Court.

Reversed and Remanded with directions

(Seven pages in original opinion.)

People of the State of Illinois, Defendant in Error, v.
Russell Clayton, Impleaded, Plaintiff in Error.

Error to Circuit Court, Adams County.

APRIL TERM, A. D. 1937.

292 I.A. 646

Gen. No. 9051.

Agenda No. 1

MR. JUSTICE FULTON delivered the opinion of the Court.

Plaintiff in Error has failed to comply with the plain requirements of Rule 39 of the Supreme Court and Rule 9 of this Court. The rule provides that the brief of Appellant shall contain a short and clear statement of the case showing among other things, "Third, in cases depending upon the evidence, the leading facts which the evidence proved or tended to prove, without quotation of evidence, discussion or argument and without detail, but with appropriate references to the abstract, and Fourth, how the issues were decided upon the trial or hearing and what the judgment or decree was. The concluding subdivision of the statement of the case shall be a brief statement of the errors or cross-errors relied upon for a reversal or of the cross-errors submitted by an Appellee prosecuting a cross appeal." Plaintiff in error has failed to show in his statement how the issues were decided upon the trial and what the judgment of the trial court was. There was no formal statement of errors relied upon for reversal except as they can be found in his argument of the facts contained in the statement. We doubt if the issues have been sufficiently presented to be entitled to the consideration of this Court. *Farmers State Bank of Belvidere v. Meyers*, 282 App. 549. *Trust Co. of Chicago v. Iroquois Auto Ins. Underwriters*, 285 App. 317. However, as the record is short we have concluded to review this case on its merits.

Plaintiff in error, together with John T. Ellison and Veraine Miller, were indicted in the Circuit Court of Adams County for larceny of hedge posts. At the time of the trial Ellison and Miller had been convicted and were serving sentences out of another court so that the plaintiff in error was the only defendant on the hearing. The jury found him guilty of larceny, fixing the value of the posts at the sum of \$12.00, and he was sentenced to pay a fine of One Dollar, and also

to stand committed to labor at the Illinois State Farm at Vandalia for the period of one year. He has sued out this writ of error to reverse the said judgment.

The posts were stolen from one Albert T. McCrory on September 25, 1935. They were discovered and identified in possession of an elevator company a few miles distant on September 27th. The manager testified to purchasing the posts from plaintiff in error Clayton, Ellison and Miller. The two last named defendants were brought back to testify on writs of habeas corpus ad testificandum and related just how the larceny occurred, positively connecting plaintiff in error with the theft and sale of the posts. Plaintiff in error took the stand in his own behalf and admitted the sale of the posts, but testified that he purchased them from Ellison and knew nothing about the theft.

Plaintiff in error contends that the evidence does not establish his guilt beyond all reasonable doubt because the witnesses, Ellison and Miller, were impeached and were not corroborated. An examination of the record does not disclose any impeachment of this testimony except by Clayton himself and a few character witnesses. The undisputed testimony shows Clayton in company with Ellison and Miller on the day after the posts were stolen and his negotiation and sale of the posts. While the testimony of accomplices should always be viewed with suspicion, both Ellison and Miller were serving out sentences for other offenses and had nothing in particular to gain by testifying falsely in this case.

The jury had the opportunity of seeing and hearing the witnesses and were in better position to determine their credibility than a reviewing Court. We do not find any warrant for disturbing the verdict of the jury in this case.

Plaintiff in error further complains that Ellison and Miller were not named on the indictment as witnesses, that he was not served with notice that they would be produced at the trial and were therefore not competent witnesses. The record shows that both witnesses were named as defendants in the indictment. At the time of the trial the plaintiff was given the opportunity to examine them long before they were called to testify and made no objection to their being called to the stand on the grounds of surprise, prejudice or otherwise. Under these circumstances it was entirely within the sound legal discretion of the Court to allow both witnesses to testify. *People v. Weil*, 243 Ill. 208.

The contention of Plaintiff in error that the admission of two of the posts in evidence, is without merit, first, because he made no objection to their introduction at the time and second, because they were positively identified by several witnesses as part of the posts charged to be stolen in the indictment.

Finally, plaintiff in error urges that the case should be remanded for a new trial because of newly discovered evidence. On a supplemental motion for new trial two affidavits in support thereof were filed by Loyal Anderson and Wayne Canterbury in which they set up the fact that on the night the posts were charged to be stolen they were at the home of Plaintiff in error. In Anderson's affidavit he states that while he was at said home the witness Ellison drove into the place with a load of hedge posts which Plaintiff in error had agreed to take to Bloomington. These affidavits bear date of October 1, 1936, nearly a year after the indictment was returned, and without comment upon the subject matter thereof they fall short of complying with the requirements of newly discovered evidence sufficient to warrant a Court to grant a new trial.

Plaintiff in error was in possession of this information from the date of his arrest, and with but slight diligence could have produced the same at the trial. It was not in any particular evidence discovered since the trial, and the Court properly denied the supplemental motion for new trial. *People v. Williams*, 242 Ill. 197.

We are convinced that the Plaintiff in error received a fair trial in the Circuit Court and the verdict of the jury is supported by competent testimony. There does not appear to be any substantial error in the record and the judgment of the trial Court is affirmed.

Affirmed.

(Four pages in original opinion.)

Abstract Opinion filed Oct. 15, 1937
hearing denied - Jan. 4, 1938

PUBLISHED IN ABSTRACT

The First National Bank of Pittsfield, Illinois, a Banking Corporation, Appellant, v. Henry Sash, Lizzie Sash and Iola Pyle, Appellees.

Appeal from Circuit Court, Brown County.

APRIL TERM, A. D. 1937.

292 I.A. 646³

Gen. No. 9057

Agenda No. 10

MR. JUSTICE FULTON delivered the opinion of the Court.

This case was tried upon the pleadings in the Court below. On December 13, 1935, the Appellant, First National Bank of Pittsfield, Illinois, filed its complaint in the Circuit Court of Brown County, Illinois, seeking to remove and cancel a mortgage as fraudulent which was executed by the Appellees, Henry Sash and Lizzie Sash, his wife, to their daughter Iola Pyle of Pike County, Illinois.

The facts set out in the complaint are that on October 25, 1935, Appellant obtained a judgment by confession in the Circuit Court of Pike County against Appellees, Henry Sash and Lizzie Sash, in the sum of \$776.46 and costs; that a transcript of said judgment was secured and filed in the Circuit Clerk's Office of Brown County, Illinois on October 30, 1935. On October 31, 1935, an execution was issued directed to the Sheriff of Brown County to serve on the said Appellees, Henry Sash and Lizzie Sash, and which was afterwards served on both of said Appellees and returned by the Sheriff, "No property found."; that on June 7, 1935, after the indebtedness to the Appellant had been incurred, but before judgment, the Appellees' Henry Sash and Lizzie Sash, mortgaged all of their real estate, consisting of a farm in Brown County for the sum of \$2,000.00 to their daughter, Iola Pyle; the other Appellee in this cause; that the mortgage was without consideration, was a mere sham and fraudulent as to the Appellant, a creditor, and executed for the express purpose of hindering and defrauding the Appellant in collecting his just indebtedness and demands, and for the purpose of preventing a levy and sale of the said farm premises; that the Appellants, Henry Sash and Lizzie Sash have no property, either real or personal, liable to levy or sale, ex-

cept the said farm premises; that the said judgment still remains in full force and effect and unsatisfied.

The complaint asked that the said mortgage be held fraudulent and removed out of the way of Appellants execution and for other relief.

The amended answer of the Appellees admits the judgment of the Appellant, and the execution of the mortgage, but denies that it was a pretended mortgage; alleges that it was given to secure a valid, subsisting indebtedness due from the Appellees, Henry Sash and Lizzie Sash to the Appellee Iola Pyle. The answer contains the following further averment.

"Defendants assert that the indebtedness upon which the aforesaid judgment was rendered, is not the indebtedness of any of these defendants, but the indebtedness of one Clinton Sash and that on the 28th day of January, 1932, plaintiff entered into an agreement with the defendants, Henry Sash and Lizzie Sash, that if they would sign a note then due plaintiff from said Clinton Sash, that so long as said Henry Sash shall be alive, plaintiff would not call upon Henry Sash and Lizzie Sash to pay said indebtedness even though said Clinton Sash should not be able or does not pay said indebtedness."

A copy of the contract referred to was incorporated in the amended answer and reads as follows:

"This agreement entered into this 28th day of January, 1932, between Clinton Sash, Henry Sash, Lizzie Sash, and The First National Bank of Pittsfield, Illinois, Witnesseth: That in consideration of Henry Sash and Lizzie Sash signing a note for \$926.95 dated Jan. 28, 1932, payable in twelve months to the order of the First National Bank of Pittsfield, Illinois, the note being an obligation of Clinton Sash to the bank, and said additional signers being for the further strengthening the note; it is agreed by the said bank that as long as said Henry Sash shall be alive, the said bank shall not call upon Henry Sash or Lizzie Sash to pay said note, even in the event that said Clinton Sash himself shall not be able or does not pay said note himself.

Witness the hand of F. A. Hicks, Asst. Cashier of the First National Bank of Pittsfield, Illinois.

F. A. Hicks,
(Bank Seal) Asst. Cashier, 1st Natl. Bank
of Pittsfield, Illinois."

The Appellant moved to strike certain portions of the amended answer of the Appellees, specifying particularly as grounds in support of such notion that the answer constituted a collateral attack on Appellants judgment; that the agreement hereinabove quoted was not the contract of Appellant but the agreement of one F. A. Hicks, as an individual; that the agreement to forbear was Ultra Vires on the part of the Bank and that the contract only required the Appellant to forbear as long as the property of the Sashes was kept in the same condition as when the contract was made. Attached to the motion was the affidavit of G. B. Meyer, Cashier of Appellant, stating in substance that the note upon which Appellant's judgment was secured was not the note referred to in the contract set out in the amended answer. The Appellees made a cross motion to strike the affidavit of G. B. Meyer.

The Court denied the motion of the Appellant to strike portions of Appellees answer and granted their cross motion to strike the said affidavit. While the record does not disclose the fact, it is stated in Appellees brief that the Appellant then elected to stand by its motion and the Court entered a decree dismissing the complaint of the Appellant at its cost. We assume this was the situation because Appellant has not argued that no rule was entered upon it to plead further or that they were not permitted to do so, and we are passing upon the questions raised with that understanding.

The complaint of Appellant was in the nature of a Creditor's Bill and the Appellees were entitled to assert any defense they might have against the judgment upon which the complaint was based. There was no question of the rights of innocent purchasers or third persons involved in this cause and a valid agreement to forbear properly set forth in the answer was in no manner a collateral attack upon the judgment.

The contract was signed by "F. A. Hicks, Asst. Cashier, 1st Natl. Bank of Pittsfield, Illinois," The subject matter of the agreement pertained plainly and clearly to the business of the Appellant Bank, and appears to be the act of the Corporation. It also bore the seal of the Bank. Under these circumstances the contract was valid and binding upon the Corporation. *Sawyer v. Cox*, 63 Ill. 130. *Bank of Minneapolis v. Glover*, 168 Ill. 314.

The controlling question for the trial Court was whether or not the Appellant was bound and precluded

by the agreement not to pursue the debt during the lifetime of Henry Sash. The admitted construction of agreement dated January 28, 1932, shows that in consideration of Appellees; Henry Sash and Lizzie Sash signing a note with Clinton Sash, payable to Appellant Bank being for the purpose of further strengthening the note, which evidenced a debt already existing between Clinton Sash and Appellant, and in order to obtain additional security for such indebtedness, the Appellant Bank agreed that it would not call upon Henry Sash and Lizzie Sash to pay the same during the lifetime of Henry Sash, even though Clinton Sash did not pay the same. It appears from the record that Henry Sash is still living. The Appellees had an unquestioned right in equity to assert the benefits accruing to them under this contract in their answer and as a defense to the creditor's suit. On a motion to dismiss where all matters properly pleaded are taken as true, the ruling of the Court denying the motion was correct. The order granting the cross motion of Appellees to strike the affidavit of G. B. Meyer attached to Appellants motion to dismiss was likewise proper. This affidavit had no proper place in the pleadings. It was filed without notice and without leave. The subject matter might have been used in a reply to Appellees answer, and then supported by proof but in affidavit form it was wholly improper as a part of the pleadings. When Appellant elected to stand by its motion, the decree dismissing the complaint for want of equity was the only course open to the Court and its decree is hereby affirmed.

Affirmed.

(Five pages in original opinion.)

Previous filed - Dec 15 1937

PUBLISHED IN ABSTRACT

**Melbourne M. Crocker and Floyd Crocker, Appellees,
v. Hatcher-Joseph, Inc., a Corporation,
Appellant.**

Appeal from Circuit Court, Sangamon County.

APRIL TERM, A. D. 1937.

Gen. No. 9067

Agenda No. 16

292 I.A. 646⁴

MR. JUSTICE FULTON delivered the opinion of the Court.

In this case the Appellee, Melbourne M. Crocker, filed a verified complaint alleging that he was employed by Lynd Motor Sales Division of Hatcher-Joseph, Inc., on March 1st, 1932, as a Mechanic, at a weekly wage of \$37.50 and continued in such employment until June 30th, 1934, at which time the Appellant owed him wages of \$1758.74; that on July 1, 1934, he rented from the Appellant a part of a garage building at 224 West Edwards Street, Springfield, Illinois, at \$45.00 per month; that he performed certain labor for the Appellant and advanced certain monies for its use and that after crediting to the wage account the accrued rent and charging sums advanced and labor performed the Appellant now owes him \$1634.71. Joined to the complaint is the claim of the Appellee Floyd Crocker who states that on March 1, 1934, he was employed by the Appellant as a laborer in connection with Lynd Motor Sales, a Division of Hatcher-Joseph, Inc., at a weekly wage of \$15.00, and so continued until June 30, 1934, at which time the Appellant owed him for back wages the sum of \$138.75.

The Appellant filed its verified answer denying that it employed the Appellee, Melbourne M. Crocker, in any capacity during the period from August 1, 1932 to June 30, 1934; denies that during said period Lynd Motor Sales was a division of Hatcher-Joseph, Inc.; states that all sums due to the Appellee Melbourne M. Crocker from March 1, 1932 to August 1, 1932 were paid; denies that on July 1, 1934, the said Crocker rented any garage space from the Appellant for \$45.00 per month and denies that the said Appellee performed any labor or advanced any money for the Appellant. Further answering Appellant denies that it ever employed the Appellee Floyd Crocker for any period of time or that it ever did owe or now owes him any sums whatsoever.

The facts disclose that in the year 1929, the Appellant was incorporated and was engaged in the sales and service of Dodge, Plymouth and Packard cars; that the Dodge manufacturer objected to the handling of both its lines of cars and the Packard line under the same roof, and so in 1930, the Packard line was moved to 530 South Fifth Street, Springfield, Illinois, where it was handled under the name of "Lynd Motor Sales Division of Hatcher-Joseph, Inc.," John Lynd was the Manager of the Packard Branch. No separate books of account were kept but all receipts of the Lynd Motor Sales were daily turned over to Hatcher-Joseph Inc., and all bills including rent were paid by Hatcher-Joseph Inc., by its own checks, signed by John Scobbie, Vice Pres. and counter-signed by some other officer of the Company. This arrangement continued until about August 1, 1932. In March 1932, the Appellee Melbourne M. Crocker was employed as a mechanic at the Lynd Motor Sales and Appellants contend continued in such employment until about August 1, 1932. On or about that date a different arrangement was made concerning the future operation of the Lynd Motor Sales, and there is a sharp conflict in the testimony as to the nature and the effect of this change.

It is the theory of the Appellees that the Appellant Hatcher-Joseph Inc., set up Lynd Motor Sales as a Division of their Corporation for the purpose of handling the Packard Agency, and to meet the objection of the Dodge manufacturer, that the two lines of cars could not be handled by the same company at the same place of business; that the business of the Lynd Motor Sales, managed by John Lynd, was in fact at all times the business of the Appellant Corporation, during all the period of time that Appellees claim they were employed by the Appellant.

It is the contention of the Appellant that on or about August 1, 1932, the Lynd Motor Sales ceased to be a part of Hatcher-Joseph Inc., that on or about that date John Lynd, Louis Sager and Melbourne Crocker, acting as partners, took over the business and continued to operate it as a partnership entirely separate and distinct from Hatcher-Joseph Inc., until the summer of 1934, looking only to the income from the business of Lynd Motor Sales for their compensation.

A large amount of testimony was taken and was in direct conflict. In addition to the oral testimony of the Appellee Melbourne M. Crocker and to corroborate his testimony that Hatcher-Joseph Inc., and Lynd Motor

Sales were in fact one and the same company the Appellees introduced the following documentary proof to substantiate their claim: A general letter head that Crocker testified was used by Lynd Motor Sales at 530 South Fifth Street up to February, 1934, which contained the following words, "Lynd Motor Sales, Division of Hatcher-Joseph, Inc., 530 South Fifth Street." Another similar letter head that was used by Lynd Motor Sales at 224 West Edwards Street from February, 1934 until they discontinued business on July 1st, 1934, containing the following words, "Lynd Motor Sales, Division of Hatcher-Joseph, Inc., 224 West Edwards Street." A group insurance policy issued by the John Hancock Mutual Life Insurance Company in the amount of \$1000, procured by Hatcher-Joseph, Inc., covering the life of Melbourne M. Crocker as its employee, dated September 1, 1933. The application was signed by Melbourne M. Crocker in which he certified that he was an employee of Hatcher-Joseph, Inc. It was stipulated that the premiums on the policy were paid by the Appellant to August 1, 1935. A number of checks issued by the Hatcher-Joseph, Inc., payable to Melbourne M. Crocker signed by John Lynd and counter-signed John Scobbie, Vice Pres. and some by J. E. Scobbie. A check of Lynd Motor Sales payable to Floyd Crocker counter-signed by J. E. Scobbie. An envelope and statement mailed by Appellant to Roy M. Seeley containing the typewritten notation on the bill head of Lynd Motor Sales, "This is your account up to July 1, 1934. When remitting please make payment to 217 South Seventh Street." The envelope and statement showed the name Hatcher-Joseph, Inc., 217 South Seventh Street which was its main place of business. Also, a number of receipts for rent payments from Melbourne M. Crocker to Hatcher-Joseph, Inc. Also oral testimony by Melbourne M. Crocker stating that he talked with Oliver C. Joseph, Secretary-Treasurer of Hatcher-Joseph, Inc., about his wages which were in arrears and Mr. Joseph told him times were bad and Appellant was pressed for ready cash but that Hatcher-Joseph, Inc., had a large amount of assets and that Crocker need not worry about his pay; that they would make it up later on. Crocker further testified that in the latter part of February 1934, Lynd Motor Sales was moved from 530 South Fifth Street to 224 West Edwards Street; that the moving was directed mostly by Mr. Lynd and was done on trucks belonging to Hatcher-Joseph, Inc. J.

E. Scobbie testified that he was Vice President of the Hatcher-Joseph, Inc., and that it was a part of his duties with the Hatcher-Joseph corporation to counter-sign checks of the Lynd Motor Sales.

Floyd Crocker, the other Appellee, testified that he was employed by Mr. Lynd as night watchman at 224 West Edwards Street from February, 1934 until June, 1934, at \$15.00 per week, and that the balance due him for wages was \$138.75. He presented a check for \$10.00, signed by Lynd Motor Sales and counter-signed by J. E. Scobbie, which he said was delivered to him at the office of Hatcher-Joseph, Inc., and at the request of Oliver C. Joseph.

In behalf of the Appellant four witnesses were produced, namely, John Lynd, Louis Sager, Lillian McCarthy and Oliver C. Joseph. All of these witnesses testified that about August 1, 1932, a conference was arranged between Joseph, Lynd, Sager and the Appellee Melbourne M. Crocker; that in the conference Joseph stated that Hatcher-Joseph, Inc., could no longer operate the Packard branch and was going to give it up, but if Lynd, Sager and Crocker wanted to take it over and operate it, Hatcher-Joseph, Inc., would turn it over to them, "lock stock and barrel"; that there was then on hand some three or four used cars and other chattel property and office equipment turned over to the Lynd Motor Sales; that at this conference Lynd, Sager and Crocker agreed to take over the business and to run it and to look exclusively to the income from their operations for their compensation; that the three of them did take over the business and operate it till in April, 1934, when Sager quit and returned to Hatcher-Joseph, Inc., and in June, 1934, Lynd quit and returned to Hatcher-Joseph, Inc. Both Lynd and Sager testified that an independent bank account was opened for Lynd Motor Sales from the proceeds of the sale of the first used car and that all three of the men from time to time made deposits on the account; that they had their own letter heads and statements printed up and opened their own ledger accounts, and that all income was divided equally between the three of them. All four of the above named witnesses for the defense testified that after August, 1932, Hatcher-Joseph, Inc., had no interest whatsoever in the Lynd Motor Sales. Joseph, Sager and Lynd all testified that Hatcher-Joseph, Inc., had nothing whatever to do with the employment of Floyd Crocker.

The problems in this case are almost exclusively questions of fact and not of law. The Appellant contends that the Appellees have wholly failed to sustain the burden of the proof and have failed to establish their right to recover by the preponderance or a greater weight of the evidence, but on the contrary the greater weight of the evidence is overwhelmingly against the contentions of the Appellees and in favor of Appellant; that the verdicts were the result of passion and prejudice and against the manifest weight of the evidence.

It is conceded by counsel for both parties that Courts are reluctant to over turn the verdict of a jury upon the question of the weight of the evidence, and especially where there is merely a contrariety of evidence. The Appellant relies upon the fact that the Appellees own testimony stands alone and uncorroborated and expressly denied by four witnesses. It is well established law however, that the greater number of witnesses does not always establish on which side lies the preponderance of the evidence. One witness may be supported by corroborative proof in a case to such an extent that his testimony may over come that of the greater number of the witnesses. In this case we think the jury had a right to consider the interest of the witnesses in the cause. Of course, it is apparent the Appellees had a decided interest in the outcome of this cause. On the other hand the witnesses for the Appellant were not entirely disinterested. John Lynd, the acknowledged manager of Lynd Motor Sales, was a son-in-law of Hatcher and a stockholder of Hatcher-Joseph, Inc., and when he left the Lynd Motor Sales he immediately went back in the employ of Hatcher-Joseph, Inc. Sager was a former employee of Hatcher-Joseph, Inc., and also a brother in law of Oliver C. Joseph, Secretary-Treasurer of Hatcher-Joseph, Inc., and when he left Lynd Motor Sales in April, 1934, he returned to Hatcher-Joseph, Inc., as a mechanic. Oliver C. Joseph as Secretary-Treasurer of that corporation was one of the active executive officers and a stockholder. Lillian McCarthy was cashier and bookkeeper for Hatcher-Joseph, Inc., and also a stockholder. The jury had a right to consider all of these facts in weighing the testimony and also to take into consideration all of the documentary proof introduced in behalf of the Appellees and hereinabove noted as well as the oral testimony of the Appellees and J. E. Scobbie.

Without discussing the testimony any more in detail it seems to us that this Court is not warranted in substituting its view of the testimony for that of the jury and that there is sufficient competent proof in the record upon which the jury might base its verdicts in favor of the Appellees. *Bouslough v. Schumacher*, 270 App. 79. In *Madelkow v. Meyer*, 219 App. 286, the Court said:

“It may be conceded as the settled law of this State that the verdict of a jury upon the facts where they are in conflict will not be lightly disturbed by a court of review unless the court is firmly of the opinion from such evidence that the verdict and judgment are clearly contrary to its weight.”

The weight of the testimony is for the jury and we cannot say, that it is our opinion from the evidence, that the verdicts in this case are clearly and manifestly against the weight of the evidence.

We cannot find any substantial error in the rulings of the Court on the admissibility or refusal of evidence in this case. The judgments of the trial Court are therefore affirmed.

Affirmed.

(Eight pages in original opinion.)

66A

C. C. Worthy, Plaintiff-Appellant, v. William A.
Guthrie, Defendant-Appellee.

Appeal from the Circuit Court of Calhoun County.

APRIL TERM, A. D. 1937.

292 I.A. 647'

Gen. No. 9014

Agenda No. 14

MR. JUSTICE DAVIS delivered the opinion of the Court.

This is an appeal from a judgment of the Circuit Court of Calhoun County, in which the court found in favor of William A. Guthrie, defendant-appellee, and adjudged that he recover of and from C. C. Worthy, plaintiff-appellant, the possession of the steam shovel replevied and awarded damages of one dollar for the detention thereof and ordered the issuing of a writ of *retorno habendo*. The defendant-appellee filed pleas of ownership non-cepit, non-detinet, and the statute of limitations to which last plea plaintiff-appellant filed a replication in which it was alleged that defendant-appellee fraudulently concealed the cause of action.

Charles V. Pregaldin, who was one of the members of the firm of Pregaldin & Warren, a partnership which was formed for the purpose of constructing project 4-A and 4-B on route 38 between Hardin and Kampsville, in Calhoun County, Illinois. Charles E. Warren died in the early part of April, 1924. Pregaldin had actual charge of the operation of the business of the partnership.

They rented the steam shovel in question from the Clapp, Riley & Hall Equipment Co., of Chicago, Illinois, with the option to purchase the same, applying the rental on the purchase price. This was on November 13, 1924. Jones & Jordan, a construction company, was one of the sub-contractors under Pregaldin & Warren in this work. They had this steam shovel on this construction work and on March 13, 1924, or just prior thereto, the Clapp, Riley & Hall Construction Co. had repossessed the shovel from Jones & Jordan. The partnership then, through one Frank McGillicuddy, the agent of Clapp, Riley & Hall Construction Co., on November 13, 1924, took over the steam shovel upon the same terms by which Jones &

Jordan were in possession of it, that is, by renting, with the option to purchase, applying the rental on the purchase price. Pregaldin personally conducted these negotiations. There was no written contract or agreement of purchase between Pregaldin, the surviving partner, and the Clapp, Riley & Hall Construction Co. Pregaldin, the surviving partner, did not pay the Clapp, Riley & Hall Construction Co. the regular monthly payments and they garnisheed Scott & White, who made the estimates for Pregaldin & Warren.

When Pregaldin & Warren signed the State Highway contract the state accepted as bondsmen, in the sum of \$20,000.00, Judge John Day, George Cockrell, William Shephard and Cary E. Clendenny. Before the road contract was completed Pregaldin & Warren defaulted, and their four sureties were compelled to pay under this bond the sum of \$4,000.00 each. Pregaldin & Warren also failed to pay other creditors as bills became due, including payments on the steam shovel. These creditors, including the Clapp, Riley & Hall Construction Co., filed liens with the Highway Department and the Department then withheld the payment of moneys due to Pregaldin & Warren in the sum of about \$24,012.71 until the liens filed against those funds were determined.

Pregaldin, as surviving partner of the firm of Pregaldin & Warren, employed C. C. Worthy, plaintiff-appellant, a practicing attorney of Hardin, Illinois, to represent him in the litigation concerning the liens filed with the Highway Department. C. C. Worthy, plaintiff-appellant, acted as his own attorney in this suit and also took the stand as a witness in his own behalf and testified he was consulted in 1928 or 1929 by C. V. Pregaldin, surviving partner of the firm of Pregaldin & Warren, with reference to the settlement of the liens filed against the funds due the firm held by the Highway Department of the State of Illinois. He advised Mr. Pregaldin that if he took the matter up he would charge fifty percent of whatever money was obtained for him out of the litigation. This offer was accepted. Worthy was engaged in the litigation for better than three years, and about the month of April, 1932, the Highway Department paid to the creditors of the firm and to Mr. Pregaldin \$24,012.71. Of that amount Pregaldin received \$9,412.71, which he indorsed to Worthy as part payment of his fee for services, leaving a balance due him of \$3,000.00 which

has been owing to him since April, 1932, from Pregaldin; that he bought the steam shovel from Pregaldin for \$1,000.00, the same to be credited on the fee he owed him. He traded and delivered the steam shovel to the John Fabick Tractor Co., Mr. Pregaldin assisting him in getting the kind of tractor and disc he bargained for. The trade was finally consummated in December, 1933, and Worthy had the tractor and disc delivered to the farm of C. V. Pregaldin in Jersey County. On cross-examination he testified that the contract was not that he was to receive as his attorney's fee fifty percent of the money that he obtained for Pregaldin out of the litigation, but that he was to get fifty percent of all moneys he obtained from the State Highway Department out of the litigation and liens by which his money was held up. At the time he purchased the steam shovel he said he had heard it was at the Guthrie place, and that he had known that for at least three or four years. He did not talk to Mr. Guthrie as to his claim of ownership of the steam shovel.

On October 13, 1932, after the Clapp, Riley & Hall Construction Co. received the amount due them on their claim for lien, they executed and delivered a bill of sale for the steam shovel to Pregaldin & Warren. On November 29, 1933, Pregaldin executed a bill of sale for the steam shovel to the plaintiff-appellant Worthy, in consideration of a credit of \$1,000.00 on the balance of the \$3,000.00 attorney's fee still owing to Worthy by Pregaldin.

On March 12, 1928, defendant-appellee, Guthrie, had his first conversation with Pregaldin at his home in Jersey County regarding the purchase of the steam shovel. Sometime between March 12 and the first day of April, 1928, Cary Clendenny, George Cockrell, Charles Pregaldin, Judge John Day and Guthrie met in Hardin at the court house. Mr. Shephard, one of the bondsmen, was absent, but was represented by George Cockrell. Mr. Clendenny, Mr. Cockrell and Judge John Day were present a part of the time when Guthrie and Pregaldin talked, but none of them heard all of the conversation. Guthrie and Pregaldin went out and were to do their trading. The purpose of the negotiations was to sell the shovel to Guthrie and apply the proceeds of the sale to the claims of the bondsmen. Pregaldin said he would take \$2,500.00, cash, and all of the bondsmen agreed to take \$2,500.00

worth of stock in the Calhoun Orchard & Clay Products Co. and Pregaldin was to be credited with that amount on what he owed his bondsmen. The testimony of Guthrie, Clendenny and Cockrell is that the bondsmen agreed to take \$2,500.00 worth of the Calhoun Orchard & Clay Products Co. stock and that Pregaldin was to be credited with that amount on what he owed the bondsmen, and that Pregaldin agreed to sell the steam shovel to Guthrie on those terms. Pregaldin said it would be all right to move the shovel.

At this time the Clapp, Riley and Hall Equipment Co. had filed a lien with the Highway Department for the balance of the purchase price of the shovel, and there were sufficient funds withheld by the Highway Department to pay all claims and liens filed, and when the liens were determined the Clapp, Riley & Hall Equipment Co. would be fully paid and the title of the shovel would be free from the lien of said Clapp, Riley & Hall Equipment Co. claim.

At this time the shovel was setting alongside of the hard road, two or three miles north of Hardin. Guthrie, defendant-appellee, took immediate possession of the shovel and sold it to the Calhoun Leasing Corporation, a company formed to produce clay on the Calhoun Orchard & Clay Products Co. land, in which Guthrie was a stockholder. In September, 1928, Guthrie repurchased the steam shovel from the Calhoun Leasing Corporation and retained possession of and used it on the Calhoun Orchard & Clay Products Co. property until the same was replevined by plaintiff-appellant, claiming at all times to be the owner thereof, subject to the rights of the Clapp, Riley & Hall Equipment Co.

The steam shovel was moved to the Calhoun Orchard & Clay Products Co. property in the north part of Calhoun County, Illinois, soon after April 1, 1928, where it was used to mine clay. Two and one-half or three months after April 12, 1928, Pregaldin noticed that the machine was gone from where it set on the hard road between Hardin and Michael, and made inquiries and was told it was taken to the clay mine in the north end of Calhoun County. He testified he knew it was there, but did not go where the shovel was located.

During the negotiations between Pregaldin and Guthrie for the sale of the shovel, and after the terms were agreed upon, Guthrie asked to try it out, but Pregaldin said "No", but he could test the boiler with

a hammer and determine whether it was in good shape but he could not put fire in the boiler until the money was paid.

From the month of April, 1928, until November 29, 1933, when Pregaldin made a bill of sale for the steam shovel to C. C. Worthy for the consideration of \$1,000.00 to be credited on the \$3,000.00 attorney fee which Worthy claimed was due him, the record fails to show that Pregaldin ever made any claim to the shovel or exercised any kind of control over it, a period of over five years. He knew it had been removed from the place where it was left on the hard road near Hardin, and knew that Guthrie had moved it up to the north part of the county to the clay mine, and even after Clapp, Riley & Hall Equipment Co., upon payment of their lien, made a bill of sale for the shovel to the partnership, he failed to exercise any physical control over the shovel, but traded it to plaintiff-appellant, Worthy, for a credit of \$1,000.00 on a bill owed by him for attorney's fee.

At the time Worthy purchased the steam shovel he knew it was at the Guthrie place, and he had known that for at least three or four years. There was no concealment by Guthrie of the possession of and use and claim of ownership to it, during that period of over five years. We are of opinion that any action for the possession of the steam shovel by any person other than the Clapp, Riley & Hall Equipment Co., accrued more than five years before the commencement of this suit and the Statute of Limitations was a good defense.

We are of the opinion that the evidence discloses that when the negotiations took place about April 1, 1928, between Pregaldin, Guthrie and the bondsmen of Pregaldin, he sold his interest in the steam shovel to Guthrie. At this time he refused to let Guthrie try it out by putting a fire under the boiler. The proof shows that Pregaldin at the conclusion of the negotiations said it would be all right to move the shovel. He noticed the machine was gone and was told it had been moved to the clay mine in the north end of Calhoun County, but he did not go where the shovel was located, and never, from the day the parties met at the court house in Hardin up until November 29, 1933, did he do anything to indicate that he had any interest in the steam shovel.

The proof further is that the bondsmen agreed to take \$2,500.00 worth of the Calhoun Orchard & Clay Products Co. stock, and that Pregaldin was to be cred-

ited with that amount on what he owed the bondsmen and that Pregaldin agreed to sell the steam shovel to Guthrie on those terms.

We are of the opinion that the judgment of the Circuit Court is not against the manifest weight of the evidence. The court saw and heard the witnesses testify, and was in a better position to pass upon their credibility and the weight to be given their testimony than one that must judge from a transcript of the testimony. The court did not err in directing the clerk to enter a judgment *nunc pro tunc* in keeping with the minutes of the Judge entered on his docket.

The judgment of the Circuit Court of Calhoun County is affirmed.

Affirmed.

(Seven pages in original opinion.)

in con filed - Oct 15 1937

PUBLISHED IN ABSTRACT

Vermont Marble Company, a Vermont Corporation,
Appellant, v. George G. Bayne, G. Wilbur
Wetzel, Joseph E. Carson, and Charles
E. Dent, Appellees.

Appeal from Circuit Court of McDonough County.

APRIL TERM, A. D. 1937.

292 I.A. 6472

Gen. No. 9061

Agenda No. 11

MR. JUSTICE DAVIS delivered the opinion of the Court.

This is an appeal from a judgment of the Circuit Court of McDonough County based upon a directed verdict in favor of appellees. Appellant instituted suit to recover a judgment against appellees, as sureties, upon a certain contract entered into between appellant, the Vermont Marble Company, and the American Mausoleum Company.

The cause was tried upon the amended declaration of appellant, consisting of two counts, and an unverified plea of the general issue filed by appellees and several special pleas. All of the pleadings were filed prior to the adoption of the Civil Practice Act, the suit having been commenced on July 21, 1930.

The first count of the declaration alleges that on May 10, 1926, in consideration that the plaintiff at the request of George G. Bayne, G. Wilbur Wetzel, Joseph E. Carson, and also one Philip E. Elting, would sell on credit and deliver to the American Mausoleum Company goods and merchandise in accordance with a written contract, dated May 10, 1926, between the plaintiff and said American Mausoleum Company, said Bayne, Wetzel, Carson and Elting undertook and promised plaintiff in writing to pay plaintiff for such goods and merchandise as it should sell and deliver to the American Mausoleum Company, with interest, if the American Mausoleum Company did not pay plaintiff therefor; that Philip E. Elting was released from liability and Charles E. Dent assumed liability thereon in his stead; that plaintiff on, to-wit, September 13, 1926, and at various times thereafter, delivered goods and merchandise in accordance with said contract to the American Mausoleum Company; that at the September Term, 1929, of the Circuit Court of McDonough County a decree was entered appointing George A.

Falder receiver of the American Mausoleum Company, and said company was dissolved and its assets distributed; that plaintiff was paid \$222.50, leaving a balance due plaintiff of \$3,998.53; and that defendants have not paid plaintiff the amount due it.

The second count charges that the plaintiff entered into an agreement in writing, which was set forth in said count and is, in part, as follows:

Chicago, Ill., May 10, 1926.

Interior marble.

To American Mausoleum Company (hereinafter called the Purchaser), Macomb, Ill.

The Vermont Marble Company (hereafter called Company) proposes to furnish as required by the drawings herewith, Architects (acting for the purposes of this agreement as agents of the Purchaser), except as hereinafter modified, for the Community Mausoleum Building at Clinton, Illinois, the following building marble, viz: Said drawings are made a part hereof and are identified as follows: Blue Print Sheets, No. 2, No. 3, No. 4. The grade of marble to be furnished hereunder is Light Vein for the ceiling and all standing marble, except the fronts for the De Luxe Crypts, which are to be Light Cloud. The floor to be Corona * * *. The ceiling marble is to be 0-1½" thick. The shelves in front of the De Luxe Crypts are to be one piece in length * * *. It is understood that the purchaser is to furnish working drawings and sizes. The fronts of the De Luxe Crypts to be in one piece * * *. The purchaser shall furnish, or cause to be furnished, such further details or explanations as may be necessary to delineate the plans and specifications and to enable the Company to perform said work as herein provided. Such models, if any, as may be required for the performance of said work, shall be furnished by the Purchaser. The Purchaser shall make, or cause to be made, at the building and furnished to the Company all necessary detail measurements * * *.

All previous communications between the parties hereto, either verbal or written, contrary to the provisions of this proposal, are hereby withdrawn and annulled, and this proposal duly accepted and approved constitutes the agreement between the parties hereto, and no modification of this agreement shall be binding upon the parties hereto, or either of them, unless such modification shall be in writing, duly accepted by the Purchaser and approved by an executive officer of the Company or the manager of its Chicago office.

That defendants entered into an agreement by which they became sureties for the full payment of said contract by the purchasers, according to the terms thereof, and waived notice of any addition to or deductions from said contract in accordance with the terms thereof, and also notice of defaults.

Upon the trial of said cause the court, on motion of appellees, directed the jury to return a verdict in their favor. Thereupon the jury returned a verdict finding the issues in favor of appellees, upon which verdict judgment was rendered by the court.

The errors relied upon by appellant for reversal of said judgment are: That the court erred in striking the contract for the sale of the marble, dated May 10, 1926, and the suretyship agreement thereto attached; that the court erred in refusing to permit plaintiff to introduce in evidence the pleadings in the suit in the United States District Court for the Southern District of Illinois; that the court erred in refusing to permit plaintiff to put in its case and submit evidence in support of the issues involved; that the court erred in directing a verdict for defendant and entering judgment thereon.

Appellant offered the original contract in evidence and asked leave to read the same to the jury. Appellees objected to the offer for the reason that, although the execution of the contract was not denied under oath, yet the same should be identified as the contract upon which the action was brought. This objection was sustained by the court.

Appellant offered in evidence a certified copy of a complaint and answer filed in the United States Federal District Court, being a suit between the same parties and concerning the same subject matter, and claimed to be competent because, in the answer of G. Wilbur Wetzel, he admits the allegations of Par. 2 of the complaint with regard to the delivery of the materials, as set out on pages 5 and 6 of the complaint, and admits that the American Mausoleum Company promised to pay the amount due to the plaintiff; to which offer the objections of appellees were sustained by the court.

Appellant then proceeded to read the deposition of N. H. Archibald, a resident of Evanston, Illinois, and manager of the Chicago office of appellant. He testified he was familiar with the signatures on Exhibit 1. C. C. Holden is traveling representative, and the contract was signed by J. E. Carson, President of the American Mausoleum Company, my own signature and the signatures of the sureties.

Carson was president and G. Wilbur Wetzel was architect and general contractor; Elting and Bayne were stockholders. When the document was executed, the drawings referred to as Building Plans 2, 3 and 4 were attached to the contract. They were along with it; they were not with the contract at the time it was signed. We had to have them of course.

Appellant thereupon offered the contract, to which offer appellees objected on the ground that the witness failed to prove knowledge of the signatures, and that a proper foundation was not laid. The objection was overruled by the court and the contract, Exhibit 1, was admitted and the same was read to the jury. Plaintiff's Exhibit 2 was shown to the witness and he testified that it was received at the Chicago office of plaintiff, on July 17, 1926, by U. S. mail. The signature of G. Wilbur Wetzel was on that document. The witness was then asked if the plans referred to were enclosed in the letter. Appellees objected for the reason that the contract was signed on May 10, 1926, and this is dated July 14, 1926. The contract of suretyship was on May 10, 1926, and this, I suppose, is to show it was a Blue Print referred to and attached to the contract at the time of the execution. It was stated by the attorney for plaintiff that his theory is, according to the contract, further plans were called for and were necessary and Wetzel furnished them. The attorney for appellees stated to the court that they desired that counsel for plaintiff produce the Specifications or Blue Prints, numbered 2, 3 and 4, that are referred to in the contract. And, thereupon, Mr. Slater, attorney for plaintiff, said: We are unable to produce such Specifications or Blue Prints, and the same were not produced or exhibited in court during the progress of the trial. The objection of appellees was sustained by the Court.

Appellees moved the court to exclude the contract, Exhibit 1, admitted in evidence for the reason that the same was incomplete and fragmentary and not binding upon the defendants; and thereupon counsel for plaintiff asked the court to reserve its ruling until the case of plaintiff was finished. It was stated to the court that there was nothing in the pleadings to show that there was a substitution on this contract, and that the suit was on the original contract.

Appellees contended that the contract, as it now stands, constituted a variance between the declaration

and the proof, and moved the court to strike the contract. The court thereupon asked counsel for plaintiff if he wished to make some offer of proof, and Mr. Slater, on behalf of appellant, offered to prove that the original plans as submitted were purely fragmentary and not the plans which were contemplated by the contract as being the ultimate plans and that G. Wilbur Wetzel was the contractor; that there were a number of negotiations between Wetzel and the plaintiff, and that finally there were some plans drawn up by the Company because the drawings furnished by the Purchaser were not sufficient, and the drawings were then sent to the American Mausoleum Company and were approved by the Company and by Wetzel, the contractor, and stated he wished to call to the witness stand Charles E. Dent, G. Wilbur Wetzel and Charles Daly and Attorney Berry, to make proof of the matters and things which were offered to be proven, and wished to proceed with the reading of the deposition, and, to complete the record, would like to show that the witnesses are here in court, and asked that they be called for that purpose; to which offer appellees objected for the reason that under the declaration, or either count thereof, such evidence would not be admissible to establish liability, that both counts declare upon the liability arising under a contract of May 10, 1926. The court thereupon denied the offer of appellant because the evidence was not admissible under the state of the pleadings, and the motion to strike the contract because it did not contain all of the contract referred to, namely, the Blue Prints or Specifications, or both, was sustained.

Appellant asked leave to proceed with the reading of the deposition, to which motion appellees objected and which was sustained by the court. Mr. Slater, on behalf of plaintiff, stated he would like to call respectively, Mr. Berry, Mr. Daly, Mr. Wetzel and Mr. Dent to the witness stand for the purpose of asking them questions pertaining to these matters, and each of them, which he had just narrated. Appellees objected. The court thereupon stated that the offer you made as to what they would testify to would not be competent under the pleadings, as they stand in this case, for the reason as I have stated, you are declaring upon a contract without any modification, substitution or alteration, or anything that amounts to a waiver of those provisions. Appellees stated, "We desire to

make a motion for a directed verdict, and move that the jury be instructed to find for the defendant." Appellant asked that the motion be overruled. The court said to appellant: "In view of the court's ruling in this matter, do you have any further evidence to offer?" At this time we re-offer the evidence and offer of proof we have previously made. The motion for a directed verdict was allowed. Thereupon, by direction of the court, the jury again returned into open court and resumed their places in the jury box. Whereupon, by direction of the court, the jury rendered a verdict from their seats in the jury box, and signed by each member of the jury, and which verdict was as follows: "We, the jury, find the issues for the defendants, George G. Bayne, G. Wilbur Wetzel, Joseph E. Carson and Charles E. Dent."

It is the position of appellant that a party offering a document need offer only such portion thereof as he may deem pertinent and material to his case. That the original contract, dated May 10, 1926, between plaintiff and the American Mausoleum Company, with the suretyship agreement signed by Bayne, Wetzel, Carson and Elting, was admitted in evidence, and afterwards, on motion of defendants, Dent and Wetzel, was stricken from the record on the ground that the contract could go in evidence only if the plans and specifications referred to therein were put in at the same time; that it is apparent that the Blue Print Sheets, Nos. 2, 3 and 4, were not considered by the parties to be the ultimate plans, and this is apparent, when the original contract provides that the purchaser is to furnish working drawings and sizes, and that the purchaser shall furnish, or cause to be furnished, such further details or specifications as may be necessary to delineate the plans and specifications and to enable the Company to perform said work as herein provided; that plaintiff offered to show the original plans, which were submitted, were purely fragmentary and were not plans which were contemplated by the contract as being the ultimate plans, and plaintiff submits, that it was not incumbent upon it to introduce the blue prints referred to because they were not essential to an understanding of the contract and were, in fact, superseded and therefore immaterial.

The law is that a party must recover, if at all, on the case made by his pleadings and can not make one case by his averments and recover a judgment on au-

other and different ground, even though the latter is established by the proof. The allegations in the pleadings and the proof and relief granted must correspond. Recovery was sought in the declaration upon the original contract, and it contained no allegations that under the provisions referred to by plaintiff any change whatever was made in the original contract, or that the purchaser furnished any working drawings and sizes, or that there was any change in the plans.

The original contract provides that plaintiff proposes to furnish as required by the drawings herewith, architects (acting for the purposes of this agreement as the agents of the Purchaser), except as hereinafter modified, for the Community Mausoleum Building at Clinton, Illinois, the following building material, viz.: Interior marble. Said drawings are made a part hereof and identified as follows: Blue Print Sheets, No. 2, No. 3 and No. 4. Appellees became sureties for the full payment and faithful performance of said contract, according to the terms thereof. The blue prints governed the plaintiff and the American Mausoleum Company as to the materials to be furnished and were a part of the agreement, and when the contract was admitted in evidence over the objections of appellees the blue prints, numbered 2, 3 and 4, were not produced and offered in evidence, and Mr. Slater, attorney for plaintiff, said, "We are unable to produce such Specifications or Blue Prints," and the record discloses the same were not produced or exhibited in court during the progress of the trial. The position of appellant is not tenable, and it was incumbent upon it to offer and produce the entire contract, including the Blue Print Sheets, Nos. 2, 3 and 4. Aside from these exhibits the contract as pleaded and introduced is not complete in itself and does not contain minute details as to the merchandise sold or embody all of the essential terms of the agreement as contended by appellant. The record fails to disclose that appellees, Dent and Wetzel, made promises to pay their liabilities long after the marble had been delivered. An offer was made by appellant to show that negotiations were had between appellee Wetzel, who was the contractor, and the American Mausoleum Company, and that finally there were some plans drawn up which were sent to the American Mausoleum Company, and affirmed by them and Wetzel, after which Dent and Wetzel made the promises. From the evidence it appears that any promise of payment they may have made was not a

promise to pay what was due under the original contract, but under some contract afterwards entered into between the plaintiff and the American Mausoleum Company, for the payment of which the appellees did not become sureties.

It is further insisted that the question as to whether the marble delivered complied with the plans is not an issue, so far as Wetzel is concerned, because of the admission contained in his answer in the suit in the Federal Court that proper delivery was made is binding upon him.

We are of opinion that no reversible error was committed by the court in the exclusion of the offered records of the Federal Court. The contract, not having been admitted in evidence, the answer of defendant Wetzel would not be competent.

Appellant further contends that if appellees desired to deny the contract pleaded was not, in fact, the contract between the parties, because of the absence of the blue prints, they should have done so by verified pleas. The plea of the general issue, which was pleaded by appellees, put in issue all of the material allegations in the declaration, and it was incumbent upon appellant to prove them. This plea was a denial of all the material allegations in the declaration. The fact that the plea of the general issue was not verified does not exclude any defense to the instrument that can be made, and the only effect was to dispense with proof on the part of plaintiff that the instrument was in fact executed.

Sec. 52 of Chap. 110 of the Practice Act of 1907 has no application. Appellees did not undertake to deny the execution or assignment of the written agreement between the plaintiff and the American Mausoleum Company, declared upon, and the sole contention is, that because appellant failed to introduce the Blue Print Sheets, Nos. 2, 3 and 4, in evidence there was a variance between the declaration and the proof.

In *Gould v. Magnolia Metal Co.*, 207 Ill. 172, 69 N. E. Rep. 869, it was said: "It is argued that by failing to deny the execution of the contract as set out defendant admitted that it constituted the whole contract and agreement between the parties, and that if the defendant claimed it was not the whole contract it should deny its execution. That section of the Practice Act establishes a rule of evidence and dispenses with proof of the execution of a written instrument declared upon unless the execution is denied by a verified plea. The

execution of the contract as set out in the declaration was not, and could not truthfully be, denied by the defendant, and the letter did not tend to make a new or different contract or substitute another one. The only effect of failing to deny the execution of the contract was to make it admissible in evidence without proof of its execution. A verified plea was not necessary to permit the introduction of evidence explanatory of its meaning." Appellees did not desire to and could not deny that the contract pleaded was not, in fact, the contract between the parties because of the absence of the Blue Prints. This contention of appellant is without merit. After Exhibit 1, the contract upon which the suit was founded, was stricken because of a failure of plaintiff to produce the Blue Print Sheets Nos. 2, 3 and 4, specifying the marble required to be furnished, and without which no recovery could be had, appellant made offers of evidence, none of which was competent under the declaration, and the court thereupon, on motion of appellees, instructed the jury to return a verdict finding the issues for appellees.

It is insisted that the court erred in denying appellant the right to put in its proof under the declaration already held good by the Supreme Court of Illinois. The circuit court did not hold that the declaration did not state a good cause of action, but held that the evidence introduced failed to prove the allegations of the declaration. Appellant having made its offer of proof, all of which was incompetent under the pleadings in the case, and to which objection was made and sustained, and the evidence wholly failing to prove the material allegations of the declaration, the court did not err in instructing the jury to return a verdict in favor of appellees.

In the case of *Wilson v. Larson*, 210 Ill. App. 101, a declaration was filed consisting of the common counts with an affidavit of claim, and the defendant filed a plea of the general issue with an affidavit of merits. Counsel for the plaintiffs made the point that the defense as stated was without the issues made by the affidavit of merits as he insisted, and the court ruled that the defendant's evidence would be limited to the issues as made by the affidavit of merits the defendant had filed. Counsel for defendant then made an offer of proof to which objection was made and sustained by the court, and a motion to instruct the jury to find for the plaintiffs was allowed. The verdict and judg-

ment followed. In urging that the judgment should be reversed, the defendant alleged that it was error for the trial court to direct a verdict on counsel's opening statement to the jury, citing *Pietsch v. Pietsch*, 245 Ill. 454. The court held that case not in point, and further in its opinion the court said: "In the case at bar, the defendant made a definite offer of proof which is quite different from an opening statement, and, upon his offer, the court had the power to rule. As the evidence offered was in regard to matters without the issues made by defendant's affidavit of merits, the court properly ruled." The judgment was affirmed.

It is the settled law, in practice in this state, that where no evidence has been offered to prove any material allegation in the declaration, put in issue by the pleadings, and not admitted for the purposes of the trial, or otherwise waived or dispensed with, the court should, on motion, exclude the evidence offered on other issues in the case or direct the jury to find for the defendant. *The Continental Life Ins. Co. v. Rodgers*, 119 Ill. 474, 10 N. E. Rep. 242.

We are of the opinion that the judgment of the Circuit Court of McDonough County should be affirmed, and the same is affirmed accordingly.

Affirmed.

(Twelve pages in original opinion,)

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Union filed - Oct. 15 - 1937.
hearing denied - Jan 4, 1938

PUBLISHED IN ABSTRACT

Erma Templeman, Mary Rennie and Roscoe Lee
Calverd, Defendants-Appellants, v. The People
of the State of Illinois for the use of U. G. Usher
and Nick Kish, Plaintiffs-Appellees.

Appeal from County Court, Sangamon County, Ill.

APRIL TERM, A. D. 1937.

292 I.A. 647³

Gen. No. 9064

Agenda No. 2

MR. JUSTICE DAVIS delivered the opinion of the Court.

Erma Templeman commenced a suit in replevin against U. G. Usher and Nick Kish to recover the possession of a Chevrolet Coach which she claimed was wrongfully seized by them. Upon a trial of said cause the Circuit Court of Sangamon county entered a judgment against her for a return of said motor vehicle and for costs of suit.

She prayed an appeal to the Appellate Court, Third District, which was granted by the court upon condition that she file an appeal bond in the penal sum of \$750.00 in twenty days, and ninety days' time was allowed by the court in which to tender a bill of exceptions. The bond was filed and approved by the court on July 5, 1935, the time for filing the same having been extended by the court.

At the October Term, 1935, of the Appellate Court, U. G. Usher and Nick Kish moved the court in writing to strike from said court the appeal of Erma Templeman in said cause and, in support thereof, alleged that she had failed to file a notice of appeal in the trial court within ninety days after the entry of the judgment in said cause and failed to serve notice of appeal upon them and to make and file proof of service of notice of appeal as required by statute and the Rules of Practice and Procedure of the Supreme Court of the State of Illinois.

On October 2, 1935, the Appellate Court sustained the motion of said U. G. Usher and Nick Kish and said cause was stricken from the files of said court.

A suit was instituted in the name of the People of the State of Illinois, for the use of U. G. Usher and Nick Kish, against Erma Templeman, Roscoe Lee

Calverd and Mary Rennie, sureties upon the appeal bond of said Erma Templeman, in the County Court of Sangamon County, which was tried by the court without a jury, and the court found against said Erma Templeman and the sureties upon her bond and judgment was entered in debt in favor of the plaintiffs and against defendants for the sum of \$750.00 debt and damages for the sum of \$360.00, said judgment to be extinguished upon payment of damages and costs. This is an appeal by said Erma Templeman, Roscoe Lee Calverd and Mary Rennie, defendants-appellants, from said judgment.

Plaintiffs alleged in their complaint that the defendants by their writing obligatory acknowledged themselves to be bound unto the People of the State of Illinois, for the use of the plaintiffs, in the sum of Seven Hundred and Fifty Dollars.

That said writing obligatory was and is subject to certain conditions therein written, whereby after reciting that plaintiffs did on the 13th day of May, 1935, in the Circuit Court of Sangamon County, in an action of replevin recover a judgment against the plaintiffs for the possession of one Chevrolet Coach and for the return thereof to them and for costs of suit, from which judgment the said Erma Templeman took an appeal to the Appellate Court for the Third District of Illinois; it was provided that if the said Erma Templeman should duly prosecute her appeal with effect, and make return of the property if return shall be awarded and keep harmless plaintiffs and pay all costs and damages occasioned by the wrongful suing out of said writ of replevin and prosecute her appeal with effect and pay all costs accrued or which might accrue then the bond to be void, otherwise to remain in full force.

That at the October Term, 1935, of the Appellate Court, Third District of the State of Illinois, said appeal was dismissed by the consideration of said court and plaintiffs recovered the costs by them in and by their defense of said appeal expended, filing fee of ten Dollars. That the said Erma Templeman has not returned said Chevrolet Coach or paid the costs of said appeal or saved and kept harmless defendants for damages occasioned by the suing out of said writ of replevin, or any part of the same, to plaintiffs' damages of Seven Hundred and Fifty Dollars.

The copy of the bond, which was incorporated into the complaint, recites that the condition is such that said Usher and Kish obtained a judgment in the Circuit Court of Sangamon County against the above bounden Erma Templeman for the return of the property in question, and costs of suit, from which judgment said Erma Templeman prayed for and obtained an appeal to the Appellate Court, Third District, of Illinois.

Now, if the said Erma Templeman duly prosecutes said appeal, and shall, moreover, pay the amount of the judgment, costs, interest and damages rendered, and to be rendered against her in case the said judgment shall be affirmed in the said Appellate Court, then the obligation to be null and void, otherwise to remain in full force and virtue.

Defendants in their answer admitted the signing of the bond and also filed a plea of *res judicata*. On the trial of said cause, in addition to evidence introduced on the issues raised by the plea of *res judicata* and reply thereto, evidence was introduced by plaintiffs showing a motion made in the Appellate Court to strike the appeal of Erma Templeman from the files of said court for the reason that no notice of appeal was ever filed or given plaintiffs as required by the provisions of the Civil Practice Act and also evidence as to what was a reasonable attorney's fee which was claimed to be due plaintiffs as damages sustained by them on account of said appeal.

Defendants contended in the County Court that the court erred in entering judgment contrary to the law and evidence. Under the provisions of Sec. 80 of the Civil Practice Act, Par. 208, Chap. 110, Ill. St. Bar St. 1935, Sec. 204, Chap. 110, Smith-Hurd Ill. Stat., no formal exceptions need be taken to any ruling or action of the trial court in order to make such ruling or action a ground for review. It is not necessary in order to assign error thereon to except to the entry of judgment by the court. *Trout, et al, v. City of Herrin*, 245 Ill. App. 346. It is insisted by plaintiffs that defendants having failed to answer the original complaint admit the truth of the allegations, citing Sec. 40 (2) of the Civil Practice Act, Par. 168, Chap. 110, Ill. St. Bar St. 1935, Sec. 164, Chap. 110, Smith-Hurd Ill. Stat. While this is true, yet a default admits only that the facts alleged in the complaint are true, and not that they constitute a cause of action and if in law

they do not constitute a cause of action no judgment should be rendered on the complaint by default. *Buck v Mining Co.*, 254 Ill. 198; 98 N. E. 266; *Keen v. Leipold*, 211 Ill. App. 163.

If the plaintiff undertakes to prove his demand and the evidence introduced shows he has no legal claim against the defendant, he is not entitled to judgment. *Gray v. Joliet*, 210 Ill. App. 449. It is a fundamental rule, with no exceptions, that a party must recover, if at all, on and according to the case he has made for himself by his pleadings. He cannot make one case by his averments and have judgment on another and different ground, even though the latter is established by the proof. *Fornoff v. Smith*, 281 Ill. App. 232.

Plaintiffs insist that the bond in question and which was set out in the complaint is a replevin bond. The bond upon which suit was brought is an appeal bond given by defendants in an attempted appeal from the judgment of the county court of Sangamon county in a replevin suit.

The condition of the bond is that if Erma Templeman shall prosecute her appeal and pay the amount of the judgment, costs and interest and damages rendered and to be rendered against her in case said judgment shall be affirmed in the Appellate Court, then the obligation to be void.

The undertaking of a surety is to be strictly construed and he can not be held liable beyond the precise terms of his undertaking. *Ovington v. Smith*, 78 Ill. 250. Under the terms of the bond in question defendants are liable only in event the judgment appealed from should be affirmed by the Appellate Court.

The facts alleged in the complaint do not constitute a cause of action and for that reason no judgment should have been rendered on the complaint by default. It is alleged in the complaint that the Appellate Court dismissed said appeal. In the case of *Blair, et al v. Reading, et al.*, 103 Ill. 375, it was held:

“A dismissal of a writ of error for want of prosecution when the court has jurisdiction of the case, has always been treated as an affirmance of the decree or judgment, within the meaning of the usual conditions of such bonds; but the rule must be different when the court has no jurisdiction in the premises. It is for the obvious reason the court has no jurisdiction to pronounce a judgment of affirmance, and it would be a *non sequitur* to say a court may affirm a decree when it has no jurisdiction to hear the case for any purpose.”

It does not follow that when an appeal is dismissed, the judgment from which the appeal is taken is affirmed, and for that reason the complaint should allege the reason for the dismissal and that the plaintiff recovered a judgment against the defendant affirming the judgment appealed from. The complaint is also defective for the reason that it fails to allege that the judgment appealed from was affirmed. By the terms of the bond defendants were liable only in the event that the "judgment shall be affirmed in the Appellate Court for the Third District of the State of Illinois."

In 1935, after the Civil Practice Act was in full force and effect, Erma Templeman prayed an appeal to the Appellate Court of the Third District from a judgment of the Circuit Court of Sangamon county in a replevin suit entered in said court on May 13, 1935, which was allowed by the court upon her filing a bond in the penal sum of \$750.00 within the time fixed by the court. At the October Term, 1935, of said Appellate Court plaintiffs moved the court in writing to strike from said court the said appeal for a failure on the part of defendants to file a notice of appeal in the circuit court within ninety days after the entry of said judgment and to make and file proof of service of notice of appeal, which motion was sustained by the Appellate Court and said cause stricken.

The appeal in this case having been stricken from the files of the Appellate Court upon the motion of plaintiffs for want of jurisdiction in the Appellate Court to hear the appeal, no appeal having been perfected, it can not be said that the dismissal of the appeal was an affirmance of the judgment. The action of the Appellate Court, when it decided the motion and concluded that it did not have jurisdiction of the appeal, constituted a refusal to act upon the merits of the proceeding. It was a refusal to affirm or reverse and so cannot be considered as constituting anything in the nature of a judgment of affirmance. *Jones v. Jones*, 223 Ill. App. 214.

The judgment of the County Court of Sangamon County is reversed.

Reversed.

(Six pages in original opinion.)

union filed - May 15 1937

PUBLISHED IN ABSTRACT

Chauncey H. Laird, Appellant, v. William Alexander Watt, Appellee.

Appeal from Circuit Court, Pike County.

APRIL TERM, A. D. 1937.

292 I.A. 647

Gen. No. 9056

Agenda No. 6

MR. JUSTICE RIESS delivered the opinion of the Court.

This is an appeal by the plaintiff from a judgment for one hundred dollars entered against the defendant appellee in the Circuit Court of Pike County, Illinois, in an action for personal injuries, alleged to have been sustained by the plaintiff on September 17, 1934.

Shortly after midnight of that date, the plaintiff, Chauncey H. Laird, and one Kenneth Dunham were riding as guests in the automobile of James Robinson, which was then being operated on Federal Route No. 36 within the City of Pittsfield, Illinois. It was alleged in the complaint that while the car in which the plaintiff was so riding and proceeding westward on Federal Route No. 36, and while the defendant was operating his automobile in an easterly direction on the same Route; the latter, without warning or signal, turned his car north, directly into the path of the automobile in which the plaintiff was riding and thereby caused the two automobiles to collide and the plaintiff to be injured. Shortly after the collision the plaintiff was given first aid treatment and then taken to his home in Griggsville, Illinois, about nine miles north of Pittsfield, in a taxicab.

The plaintiff testified that at the time of the collision he was thrown forward; that his knees struck the floor of the car and his abdomen the "jumper seat"; that his shins were skinned and his knees swelled and became red; that he was shocked and dazed and suffered severe pains in his stomach; that his abdomen was discolored and red; and that he remained in bed the following day and in his home for a week.

About two or three weeks after the collision plaintiff noticed that he became easily fatigued and that his mind did not work as well as usual; that he was losing weight and developed a craving for sweets and had an unusual thirst, and he was obliged urinate at frequent intervals. He stated that his health in general was running down and that his condition was gradually growing worse.

Three or four weeks after the accident he met and talked to Dr. Chaisson on the street in Griggsville about his condition. He again saw the doctor at his office about six weeks after the collision, and later, about two months after the collision, he went to the doctor's office for an examination. By that time he had lost about twenty-five pounds in weight. After an examination and an analysis of his urine, the physician discovered sugar content and told the plaintiff that he had diabetes. Plaintiff then entered St. Mary's Hospital at Quincy, Illinois, where he remained for sixteen days. At the hospital, his diet was "adjusted" and insulin administered in treatment of his diabetic condition. Since then, he has been on a strict diet and takes insulin once or twice a day, and because of this condition it is necessary for him to expend about twenty-five dollars a month in addition to normal expenditures for his special diet.

For the purpose of proving the plaintiff's present diabetic condition to have proximately resulted from the injuries sustained in the collision in question, plaintiff produced four physicians as witnesses, including Dr. Chaisson, who had been his family physician for fourteen years. Each of the physicians, in answer to a hypothetical question, gave as his opinion that the diabetic condition was caused by the injuries and mental and nervous shock sustained by the plaintiff in the automobile accident.

Dr. Robert W. Keeton, who has been teaching, investigating and practicing medicine since 1916, and who is now Professor of Medicine and head of the Department of Medicine at the University of Illinois, testified as a witness on behalf of the defendant. He stated that since 1910 he had published in the Illinois State Medical Journal, The American Journal of Physiology and the American Clinic of North America, papers on the subject of diabetes. The same hypothetical question which had been propounded to the physicians who testified for the plaintiff was propounded to him. He gave as his opinion that the diabetic condition of the plaintiff was not caused by the injuries and mental and nervous shock sustained in the automobile accident. He further gave as his opinion that diabetes was not caused by injury or trauma.

After discussing the disease and the works of various authors on the subject, he gave it as his opinion that diabetes is hereditary in character and is trans-

mitted as a recessive characteristic implanted in the individual at birth.

The jury found for the Appellant upon the issues of Appellee's negligence, which also included the issue of due care on the part of Appellant. If the jury believed from the evidence that the plaintiff's present diabetic condition was not caused by the injuries he suffered through the negligence of the Appellee, the verdict in the sum of one hundred dollars would be adequate damages for the injuries shown by the evidence to have been sustained by the plaintiff. If, on the other hand, plaintiff's diabetic condition was caused by the injuries sustained by him as a result of the Appellee's negligence, a verdict for that amount would be clearly inadequate.

The evidence is conflicting upon the question as to whether or not the Appellant's diabetic condition was caused from his injuries. In such cases the Courts of this State have frequently held that the verdict of the jury, as to the facts, will not be disturbed unless it is manifestly against the weight of the evidence. *Chapman v. Cary*, 238 Ill. App. 605-608; *Grosch v. Mendota National Bank*, 239 Ill. App. 515-521.

The jury, whose province it was to pass upon this issue, evidently gave credence to the testimony offered on the part of the defendant to the effect that the diabetic condition of the Appellant was not caused by his injuries. This question was purely one of fact for the jury to determine from all of the evidence. The credibility of the witnesses was also a matter to be determined by the jury, and this Court can not overrule the finding of the jury and the Trial Judge on a question of fact simply because more witnesses testified on the one side than on the other. *English v. Porter*, 109 Ill. 285; *Colgrave v. Berry*, 146 Ill. App. 107; *Stenhaus v. Radke*, 145 Ill. App. 232; *Krasa v. Robbins*, 186 Ill. App. 198.

The credibility of witnesses, their capacity and intelligence, the weight of their testimony, the drawing of inferences from facts and circumstances proven are all questions of fact for the jury to pass upon and not for the Court to decide. *McGregor v. Ried, Murdock & Co.*, 178 Ill. 464; 53 N. E. 323; *Roesner v. Delenbarger*, 197 Ill. App. 23; *Manufacturers Fuel Co. v. White*, 228 Ill. 187; 81 N. E. 841.

It is a well settled rule of law in Illinois that the verdict of a jury upon the facts, where they are in conflict, will not be lightly disturbed nor set aside by

a court of review, unless the Court is firmly of the opinion from such evidence that the verdict and judgment are clearly contrary to the weight of the evidence *Bouslough v. Schumacher*, 270 Ill. App. 79-84; *Mandelkow v. Meyer*, 219 Ill. App. 286-293; *Ill. Central R. R. Co. v. Gillis*, 68 Ill. 317-319; *Lourance v. Goodwin*, 170 Ill. 390-393; 48 N. E. 903; *Carney v. Sheedy*, 295 Ill. 78-83; 128 N. E. 810. This we are unable to say under the conflicting state of the evidence in this case.

Appellant further earnestly contends that the Court erred in instructing the jury on the issue of reasonable care on behalf of the plaintiff. The Trial Court gave eighteen instructions for the plaintiff, and twenty-three on the part of the defendant. The giving of numerous instructions in cases where the issues are not involved has been repeatedly condemned by this Court. However, Appellant is in no situation to complain of error in any of the instructions complained of for the reason that the jury found for him on both the issue of defendant's negligence and the issue of whether or not Appellant was in the exercise of due care for his own safety. *Browder v. Beckman*, 275 Ill. App. 193; *Borgerson v. Chicago Railway Co.*, 187 Ill. App. 65.

We find no reversible error in the record; hence the judgment of the lower Court will be affirmed.

Judgment affirmed.

(Five pages in original opinion.)

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1. The first part of the paper is devoted to a general discussion of the subject, and to a statement of the objects of the investigation.

2. The second part contains a description of the apparatus used, and of the method of observation.

3. The third part contains a description of the results obtained, and of the conclusions drawn therefrom.

4. The fourth part contains a summary of the results, and a statement of the conclusions.

5. The fifth part contains a list of references.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

May
~~CORRECTION~~ TERM A. . 1937

TERM NO. 6

AGENDA NO. 1.

HAL MOORE,

Plaintiff-Appellee,

vs.

FRANKLIN MUTUAL INSURANCE
 COMPANY,

Defendant-Appellant.

Appeal from the
 County Court of
 Randolph County.

292 I.A. 648

STONE, P. J.

On and prior to January 12, 1935, appellee carried an automobile insurance policy with the Capitol Mutual Casualty Company, the contract liability whereof was assumed by the Franklin Mutual Company, appellant herein.

On January 12, 1935, the insured automobile truck was struck by an Illinois Central train and demolished beyond repair. On the 5th of April, 1935, the parties entered into a purported settlement for the sum of \$349.40. Appellant issued to appellee its voucher for that amount, attached to which was a release, and on the same date appellee also signed a release under oath wherein he acknowledged that the amount claimed under his policy was \$349.40. The second of the releases provided:

"Clause (5): The actual amount of the loss or damage as described above is \$775.00.

"Clause (6): The amount claimed under the above policy is \$349.40.

"Clause (7): The assured agrees to accept in full payment satisfaction and compromise of all

claims under said policy by reason of said loss or damage the sum of Three hundred Forty-nine and 40/100 Dollars (\$349.40)."

The policy in question contains the following limitations:

"No suit or action for the recovery of loss or damage covered under Part 1 of this policy shall be sustained in any court of law or equity unless commenced within twelve months after the cause of action accrues."

This suit was filed August 18, 1936. Appellant filed its answer, setting up the above limitation clause. Appellee insisted that appellant had waived said clause. Appellant in its answer set up also that it had made a full and complete settlement with appellee by virtue of the aforesaid releases. Appellee replied that the releases were obtained by fraud.

A trial was had before the Court without a jury. The court found the issues for the plaintiff and assessed his damages at the sum of \$450.00. The case is brought here on appeal.

Appellee signed two different releases and was paid the amount of \$349.40, the amount prescribed therein, as a release in full of all demands. There is no contention that he did not fully understand these releases at the time that he signed them. He claims, however, that fraud was practiced upon him in that they promised to pay him more money in the future. As said in *Gage vs. Lewis*, 68 Ill. 604, "The statements shown by the evidence could not be said to be false when made, and if not intended to be complied with when made, it was but an unexecuted intention which has never been held of itself to constitute fraud."

Without regard to whatever rights appellee may have in the promise for the \$215.00 additional which the evidence shows, we are unable to say that the evidence in this case makes out a case of fraud in the execution or procurement of the releases so signed. Without fraud the releases are complete in themselves, and as said in *Wheeler and Wilson Company vs. Barr*, the releases must speak for themselves, and, of course, speaking for themselves, they constitute a complete and full settlement of the demand of appellee.

This holding disposes of other questions raised, such as the claim that the suit was not brought within the year provided by the policy, or waiver of the terms of the policy.

In our judgment, the trial court erred in rendering judgment in this case, and the releases being a full and complete settlement, the judgment of the County Court is reversed.

to be published

JUDGMENT REVERSED.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

MAY TERM, A. D. 1937

Term No. 4

Agenda No. 8

ARCHIE W. HOLEMON,
Plaintiff-Appellee,

VS.

ROYAL NEIGHBORS OF AMERICA,
Defendant-Appellant.

APPEAL FROM
CITY COURT OF
EAST ST. LOUIS.

292 I.A. 648²

Murphy, J:

June 5, 1934 defendant-appellant issued a twenty year payment reserve benefit plan certificate, insuring the life of Helen A. Holemon. Plaintiff-appellee, the husband of insured, was named as beneficiary. The insured died March 29, 1935 and on a trial before the court without a jury a judgment was entered in favor of plaintiff-appellee, for the full amount of the face of the insurance certificate.

Defendant-appellant contends that on this appeal the answers given by the insured in her application and the answers set forth in the medical examination were warranties, that they were in fact false and that therefore the certificate was void. It tendered repayment of the premiums paid.

Defendant-appellant is a fraternal benefit society. By the terms of the certificate it was agreed that the certificate, the charter and by laws of the society, insured's application for membership and the medical report as signed by her, constituted the contract between the society and the insured.

The medical report as signed by the insured contained among others the following questions and answers, "I have not now and never have had, nor has any physician ever treated me for, or informed me that I had, any of the following named diseases or symptoms, except as listed," then follows a list of diseases and ailments and listed under heading of "Digestive System" are stomach, liver, abdominal organs, appendicitis, billous colic, chronic, diarrhea, dyspepsia, fistula, gall stones, jaundice, stricture ulcer of the stomach. Under exceptions, the answer was none. Question 12: Has your weight changed within one year? Answer: No. Gain none. Loss none. Question 13: Are you now of sound body, mind and health? Answer: Yes. Question 14: Have you within the last seven years consulted or been treated by any physician or any other person or persons in regard to personal ailments? Answer: No. Question 15: Have you ever had a personal injury or injuries or undergone a surgical operation or operations? Answer: No.

The undisputed evidence is that in 1924 she was operated upon by Dr. Knewitz and had her appendix, right tube and right ovary removed, that he treated her again in December 1933 and January 1934 for pain in the pelvic regions. Dr. Killene treated her in July 1927 for gastro intestinal disturbance at which time she was in the hospital for three days. The evidence also discloses that in October 1934 she was in the hospital for four days receiving medical attention. The hospital records made at that time showed that she lost thirty pounds in weight in the preceding twelve months.

By the terms of the application which included the questions and answers above set forth, the insured agreed that she had verified each of the answers, whether written by her or not, adopted them as her own, warranted them to be full, complete and literally true, that the exact literal truth of each should be a condition precedent to any binding contract issued upon the facts of said answers; that if any answer was not literally true any certificate issued on the faith of such answers, would be void.

The certificate sued upon provides that it is issued in consideration of the warranties and agreements made by the insured, that if the application or any part thereof was not literally true the certificate would be null and void.

Where an application for insurance is expressly declared to be a part of the contract and the answers or statements therein contained are warranted to be true and the policy or certificate of insurance is issued upon the faith of the truthfulness of such answers then the truthfulness of the same becomes a condition precedent to be treated as warranties, as distinguished from misrepresentations, and must be literally true to create any liability. They are deemed to be material to the assumption of the risk and if shown to be false there can be no recovery on the contract, however innocently the answers may have been made. *Crosse vs. Knights of Honor* 254 Ill. 80; *McClary vs. Grand Lodge Brotherhood* 282 Ill. App. 77.

In *Hancock vs. Knights of Security* 303 Ill. 66, 73, the court said, "Parties competent to contract may enter into such agreements with each other as they see fit, and it is

the purpose of the law and function of the court to enforce their contract if not in violation of law or opposed to public policy. Courts do not make contracts for parties who are fully capable of making their own agreements, and if there is no ambiguity about a contract the courts cannot permit a construction contrary to its terms. By the contract in this case the benefit certificate, the application for membership and the constitution and by-laws of the society constituted the contract of insurance, and the settled rule of law is that where an application for life insurance is expressly declared to be a part of the contract and the statements therein contained are warranted to be true, such statements will be deemed material whether they are so or not, and if shown to be false there can be no recovery on the contract however innocently the statements had been made."

Applying these rules to the facts in this case we hold that the answers and statements, as contained in the application and medical report, are to be construed as ^{that} warranties and ~~a~~ part of the answers were false.

Plaintiff-appellee contends that even though the answers and statements are warranties and false, that the judgment should be sustained for the reason that the medical examiner was the agent of the insured ^{and} that he filled in the blank spaces in the report without first obtaining the information from the insured. This presented a question of fact. Weisguth vs. Supreme Tribe Ben Hur 272 Ill. 541.

Plaintiff-appellee testified that he, the insured, and Mrs. Miller went to Dr. Hulick's office for the examination. His testimony is that his wife arranged for the appointment. "Mrs. Miller and my wife and myself went down there, we intended to go to the show, we went up to see Dr. Hulick and

he examined her and after that we went to the show." He was interrogated as to what papers his wife had signed and he testified, "He (Dr. Hulick) brought out a piece of paper about 12 x 14, he had her sign that paper, he said to her, 'Is there any tuberculosis in your family?' She said, 'No, sir.' He said 'Any cancer?' and she said 'No, sir.' We sat there talking a little bit, he wrote that down on a pad which he had, we sat there and talked a little bit and he said, 'That is all.' He also said, 'You don't look to me like you need an examination, you are the picture of health.'"

He was asked if there were any further questions to which he replied, "He (Dr. Hulick) did ask her father's and mother's name and what her father died of and what her mother died of, but they were not both deceased, her father was still living.

Mrs. Miller testified, "We went to the office and went to the waiting room. The doctor asked her a few questions and she signed a paper, then we went downstairs to the show." She stated that she saw Mrs. Holemon sign a paper but that she was not close enough to see what was on the paper. "I only know there was a few questions asked and she signed her name and went downstairs. The doctor asked her a couple of questions but what they were I couldn't exactly swear to now." On cross examination she testified that the doctor did ask her some questions and on redirect she stated she did not know how many questions were asked. Dr. Hulick died previous to the trial.

Plaintiff-appellee concedes that the medical examiner did propound certain questions in reference to tuberculosis, cancer and the names of insured parents but he does not

testify nor does the evidence tend to show that these questions were the only ones asked.

The witnesses were not able to identify the medical report introduced in evidence by defendant-appellant as the one they saw insured sign at Dr. Hulick's office. Plaintiff-appellee failed to make the necessary proof to support his contention.

The judgment of the trial court is reversed and the cause remanded.

Reversed and remanded.

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